NO. 10-565

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY P. L. TIBBETTS,
Petitioner

v.

JAMES DITTES, DWAYNE HUEBNER, THOMAS OGLETREE, JAMES GARRETT, HARRY ADAMS, PENELOPE LAURENS, DETRA MACDOUGALL AND THE YALE CORPORATION

Respondents.

Supreme Court, U.S.
FILED
JAN - 7 2011
OFFICE OF THE CLERK

MOTION FOR REHEARING ON PETITION FOR CERTIORARI FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED ON REHEARING

Under 28 U.S.C. § 2072, where Congress authorized the Supreme Court with supervisory "power to prescribe general rules of practice and procedure" in the local rules of courts of appeals so that they do "not abridge, enlarge or modify any substantive right," and

Where the Local Rules of the U.S. Court of Appeals for the Second Circuit do not have any published "notice" procedures for pro se-to-counseled adjudications, and

Where the Second Circuit Forms C and D continue to remain contradictory and require a retroactive appearance for newly-retained counsel in pro se appeals:

1. Is the Due Process Clause controlling where the Petitioner did not receive any published "notice" requirements, prior to an entry of default, and the Fifth Amendment specifically states that "*No person* . . . shall be deprived of life, liberty or property without due process of law"?

2. Does 28 U.S.C. § 2072 confer mandatory supervisory jurisdiction and "power" on the U.S. Supreme Court to review the local rules of lower courts so that they do "not abridge, enlarge or modify any substantive right"?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES CITED. v

CITATION OF OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 1

I. STATEMENT FOR REHEARING 2

II. DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS STILL A CONTROLLING SUBSTANTIVE RIGHT 2

III. THE RULES ENABLING ACT (28 U.S.C. §§ 2071-2077) IS A CONTROLLING STATUTE WITH MANDATORY JURISDICTION TO REVIEW THE LOCAL RULES OF COURTS OF APPEALS. 4

A. Court's Discretionary Standard Does Not Supersede Mandatory Supervision Under Section 2072 7

B. Petitioner Satisfies Standard for Review of Federal Rules Under Section 2072 12

3. Does 28 U.S.C. § 2072 confer a duty on the Justices of the Supreme Court to appoint a special master to conduct fact-finding over deficient and defective "notice" requirements in the Local Rules of the Second Circuit?

4. Under 28 U.S.C. §§ 331, does the Judicial Conference of the United States have concurrent jurisdiction to "review rules prescribed under section 2071 of this title . . . for consistency with federal law"?

5. Is the Chief Justice of the Supreme Court, who is also Chair of the Judicial Conference of the United States, obligated to report defective or deficient "notice" procedures in the local rules of a U.S. court of appeals to the Judicial Conference, so that it may carry on its "continuous study of the operation and effect of the general rules of practice and procedure" in the courts of the United States?

6. Is the Chief Justice of the Supreme Court obligated to inform the Judiciary Committees of the United States Congress over defective, deficient "notice" requirements in the Local Rules of the Second Circuit, so that steps may be taken to bring these rules in compliance with 28 U.S.C. § 2072(b)?

TABLE OF AUTHORITIES

CASES:

Armstrong v. Manzo, 380 U.S. 545 (1965) 15

Caperton v. Massey, 129 S.Ct. 2252 (2009) 24

City of Chicago v. Morales, 527 U.S. 41 (1999) 11

Fuentes v. Shevin, 407 U.S. 67 (1972). 4

Mathews v. Eldridge, 424 U.S. 319 (1976) 24

Morrissey v. Brewer, 408 U.S. 471 (1972) 3

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). 3

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) 13, 14

Santosky v. Kramer, 445 U.S. 745 (1982) 24

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 9

Shady Grove Orthopedic v. Allstate, 130 U.S. 1431 (2010) 10, 11

Vitek v. Jones, 445 U.S. 480 (1980) 4, 24

CONSTITUTION:

U.S. Const., Art. III. 1

U.S. Const., amend V. . . . . *Passim*

IV. PETITIONER SATISFIES REQUIREMENTS FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10(a) 14

A. Entry of Default Judgment. 15

B. Set Aside of Judgment For a Due Process Violation 17

C. Second Circuit Ruling Raises "An Important Question of Federal Law" Which Has Not Been Settled 18

VI. JUDICIAL CONFERENCE OF THE UNITED STATES HAS CONTROLLING INTEREST UNDER 28 U.S.C. § 331 21

A. Petitioner's Request For a Referral to the Judicial Conference for a Fact-Finding Study on the Notice Deficiencies in the Local Rules of the Second Circuit 22

VII. CONCLUSION 27

IV. PETITIONER SATISFIES REQUIREMENTS FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10(a) 14

A. Entry of Default Judgment. 15

B. Set Aside of Judgment For a Due Process Violation 17

C. Second Circuit Ruling Raises "An Important Question of Federal Law" Which Has Not Been Settled 18

VI. JUDICIAL CONFERENCE OF THE UNITED STATES HAS CONTROLLING INTEREST UNDER 28 U.S.C. § 331 21

A. Petitioner's Request For a Referral to the Judicial Conference for a Fact-Finding Study on the Notice Deficiencies in the Local Rules of the Second Circuit 22

VII. CONCLUSION 27

TABLE OF AUTHORITIES

CASES:

Armstrong v. Manzo, 380 U.S. 545 (1965) 15

Caperton v. Massey, 129 S.Ct. 2252 (2009) 24

City of Chicago v. Morales, 527 U.S. 41 (1999) 11

Fuentes v. Shevin, 407 U.S. 67 (1972). 4

Mathews v. Eldridge, 424 U.S. 319 (1976) 24

Morrissey v. Brewer, 408 U.S. 471 (1972) 3

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). 3

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) 13, 14

Santosky v. Kramer, 445 U.S. 745 (1982) 24

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 9

Shady Grove Orthopedic v. Allstate, 130 U.S. 1431 (2010) 10, 11

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CONSTITUTION:

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STATUTES:

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28 USC §§ 2072 . . . . . *Passim*

28 USC §§ 2073 25

28 U.S.C. §§ 331 . . . . . 1, 20, 21, 22

FEDERAL RULES

Federal Rules of Appellate Procedure 47(b) 19-24

OTHER:

Senate Report, 1608, 80th Congress, June 1, 1948 . . 7

Supreme Court Compendium: Data, Decisions & Developments, http://library.cqpress.com 9

CITATION OF OPINIONS BELOW

This Motion for Rehearing seeks review of the Supreme Court's decision, dated December 13, 2010, declining to review this Petition. The decision is reprinted on the U.S. Supreme Court website at http://www.supremecourt. gov/docket/docket.aspx

JURISDICTIONAL STATEMENT

The Court continues to have jurisdiction pursuant to 28 U.S.C. § 1254(1), 28 USC § 2071, 2072, and Article III of the U.S. Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Motion for Rehearing involves Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, the Enabling Rules Act under 28 USC §§ 2071-2077, and the concurrent jurisdiction of the Judicial Conference of the United States, under 28 U.S.C. §§ 331.

I. STATEMENT OF REHEARING

In accordance with Supreme Court Rule 44(2), this Motion for Rehearing timely sets forth "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented."

II. DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS STILL CONTROLLING

The Due Process Clause of the Fifth Amendment unequivocally states that "No person shall. . . be deprived of life, liberty, or property, without due process of law." The phrase "No person" means exactly that, *no person*, including this Petitioner.

The essential maxim of the "due process of law" is that "individuals must receive notice and an opportunity to be heard before the government deprives them of property." *United States v. $ 8,850,*

461 U.S. 555, 562 (1983). In any situation regarding government-sponsored deprivation, the government must furnish "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 315 (1950).

In order to pass constitutional muster, "notice" must state 'where' and at 'what time' a party is to proceed; it must also provide the "legal consequences [that] may ensue" for a failure to act. *Fuentes v. Shevin,* 407 U.S. 67, 79 (1972). As a final threshold issue, due process must be "flexible," calling "for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Once it is determined that the Due Process Clause applies--no court of law may "constitutionally

authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Vitek v. Jones*, 445 U.S. 480, 490 (1980).

In this case, the Second Circuit (1) failed to furnish "notice" requirements regarding the application of Forms C and D, (2) defaulted the Petitioner without identifying any applicable "notice" requirements, and (3) deprived the Petitioner of his property right on appeal. The Supreme Court declined to review the Petitioner's due process violation and the insufficient "notice" requirements in the Second Circuit Local Rules on December 13, 2010. This Motion for Rehearing now follows.

III. THE RULES ENABLING ACT (28 U.S.C. §§ 2071-2077) IS A CONTROLLLING STATUTE

In 1934, the United States Congress passed the Rules Enabling Act (28 U.S.C. §§ 2071-2077), which today provides a uniform framework for all

rule-making in the federal court system. Section 2071 of this Act provides that:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Congress further intended that the Supreme Court have mandatory "power" to supervise the integrity of this federal rule-making process, as well as the *actual content of the general "rules of practice and procedure"*:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

It is clear that Congress intended for the Supreme Court to continuously and constantly monitor and supervise the rule-making apparatus of

the federal judiciary, and ensure to Congress that the "rules of practice and procedure" of the U.S. district courts and courts of appeal do "not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b).

The legislative history of the Rules Enabling Act *confirms* that the Supreme Court is intended to be the final authoritative voice on all matters pertaining to court rules in the federal judiciary. As recorded on the U.S. Senate floor, the Houses of Congress have:

> neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity of amendment or change . . . for the obvious reason that the professional nature of the task would leave the legislature little time for matters of substance and statesmanship. [Senate Report, 1608, 80th Congress, June 1, 1948.]

Undeniably, then, 28 U.S.C. § 2072 extends broad "power[s]" to the Supreme Court to exercise

continuous vigilance and supervision over the local rules of *all* inferior courts, so that they are "consistent with Acts of Congress," and that they do "not abridge, enlarge or modify any substantive rights." 28 U.S.C. § 2072(b). In short, "discretion" plays no part in whether the Supreme Court should review defective notice procedures; Congress clearly intended that 28 U.S.C. § 2072 be mandatory in the review of local court rules.

A. Court's Discretionary Standard Does Not Supersede Mandatory Supervision Under Section 2072

In June 1988, Congress amended this Court's jurisdiction by passing a law "to provid[e] greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes." Public Law 100-352 (102 STAT 662). While this law was intended "to improve the administration of justice," it certainly does not supersede the Court's mandatory

jurisdiction over Article III controversies, or other statutory jurisdictions conferred by Congress, such as the Court's mandatory supervision over the general rules of practice and procedure of the lower courts, pursuant to 28 U.S.C. § 2071 *et seq.*

Historically, of all the cases the Supreme Court hears, only an average of .04% involve due process violations.[1] Further, a LEXIS search shows that the Supreme Court has *never* heard a case involving due process violations, stemming from defective "notice" requirements in the local rules of a U.S. Court of Appeals. Indeed, the underlying facts in this case are extremely rare.

It is conceivable the Supreme Court could use "discretion" in declining to not review a case involving a due process violation and defective

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1 Supreme Court Compendium: Data, Decisions & Developments, http://library.cqpress.com.

"notice" requirements in the local rules. But this would *only* apply if the lower court had taken great pains to conduct a fact-finding to show the Supreme Court and Judicial Conference of the United States that the "due process of law" had been effected, and the local rules were in compliance with 28 U.S.C. §2072(b).

Such is *not the case here.* The Second Circuit undertook no "procedural safeguard[s]" to ensure the "due process of law" had been satisfied. This fatal flaw now *prohibits* the Supreme Court from declining to review this case, because the Fifth Amendment is absolutely controlling: "*No person* shall. . . be deprived of life, liberty, or property, without due process of law."

Second, *where it remains an open question whether notice* was furnished in the case below, Petitioner's underlying judgment continues to be

"void" for a due process violation.[2] The Supreme Court, therefore, is obligated to conduct a fact-finding on this outstanding due process violation, and to fail to do so would be a gross abdication of this Courts' preeminent constitutional responsibilities.

Finally, it is simply premature for the Supreme Court to certify to Congress that the Local Rules of the Second Circuit are *in compliance with 28 U.S.C. §2072(b).* At best, there is a *presumption* that these rules are in compliance with 28 U.S.C. §2072(b). At worst, the existence of insufficient "notice" requirements in the Local Rules of the Second Circuit are in violation of the Due Process and Equal Protection Clauses of the Fifth

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2. *See United Student Aid Funds v. Espinoza*, 130 S.Ct. 1367, 1377 (2010)(A void judgment "applies only in the rare instance where a judgment is premised . . . on a violation of the due process of law that deprives a party of notice or the opportunity to be heard.") (Justice Thomas writing for the majority).

Amendment.[3] If this factual finding is true, then permitting the continued existence of unconstitutional court rules, could raise alarm bells for the public and the United States Congress.

In the final analysis, even if this Court were to toss out all due process violations here, 28 U.S.C. § 2072(b) still *requires* that the Court certify to Congress that these rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Without any judicial fact-finding on this matter, it would be foolhardy make such a *presumption* and representation to Congress, that the local rules of all lower courts are in compliance 28 U.S.C. § 2072(b). Notwithstanding, without any fact-finding on this matter, if the Supreme Court should ultimately

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3. It should be instructive, here, that in seven years of litigation below, neither the Second Circuit, nor the Respondents, made any showing that (a) the Petitioner had received sufficient "notice," or (b) the court's insufficient notice requirements do *not* violate the Due Process Clause of the Fifth Amendment.

decline to review the arguably defective Local Rules of the Second Circuit, then this matter of public concern and constitutional importance must be presented to the United States Congress.

B. Petitioner Satisfies Standard For Review of Local Rules under Section 2072

In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (*per curiam*), this Court set forth a test for perceived constitutional infractions of federal rules. Where ever there is an allegation that a rule "offends" an important right, *Sibbach* establishes that "the test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14. Last year, as this Court upheld in *Shady Grove Orthopedic v. Allstate*, the test is not:

> whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself *regulates:* If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights, it is not." [*Shady Grove Orthopedic*, 130 U.S. 1431, 1442 (2010) (quoting *Sibbach*, 312 at 446)].

For seven decades this Court has "reaffirmed repeatedly that the validity of a Federal Rule depends entirely upon whether it regulates procedure." *Id.* at 1444. If it does not, and that rule seeks to 'abridge, enlarge or modify any substantive right,' then the "*federal rule cannot govern.*" *Id.* at 1436 (emphasis added).

Here, Petitioner unequivocally asserts that the Local Rules of the Second Circuit fail to furnish any "notice" requirements for the adjudication of pro se-to-counseled appeals. If the Petitioner is right, and these local rules do not furnish these basic notice

requirements, then under the Supreme Court's analysis in *Sibbach* and *Shady Grove Orthopedic*, such local rules cannot "regulate procedure," because, in fact, *such procedure is vague, non-existent, or standardless. See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (a rule "fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.") (Justices Breyer, Ginsburg and Souter concurring).

IV. PETITIONER SATISFIES REQUIREMENTS FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10(a)

Supreme Court Rule 10(a) specifies that "[a] petition for a writ of certiorari will be granted" where "a U.S. court of appeals has entered a decision" that has "departed from the accepted and usual course of judicial proceedings."

Here the Second Circuit has held that a default judgment may be entered without furnishing any published "notice" requirements for its proscribed conduct. As set forth below, there are three essential maxims of well-settled law wherein the Second Circuit has "departed from the accepted and usual course of judicial proceedings." SC Rule 10(c).

1. **Entry of a Default Judgment**

In the decisive case of *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) *(per curiam)*, this Court emphasized that the harsh and "draconian" sanctions of a default may only lie to penalize a party's "flagrant bad faith" or "callous disregard" of rules or orders. Before a court may enter a default, it must undertake a "careful[] review [of] the record" and present "findings of historical

fact" to support a party's "willful or intentional" misconduct. *Id.* at 641.

Accordingly, *National Hockey League* has been cited, followed or distinguished in 3091 cases. Since 1976, the Supreme Court has cited *National Hockey League* in seven subsequent cases. The U.S. courts of appeals have cited *National Hockey League* in 569 cases.[4]

In this case, the Second Circuit has declined to make any fact-finding of "flagrant bad faith" or "callous disregard" to support the entry of a procedural default. The Second Circuit's failure to make a fact-finding in line the Supreme Court's guidance in *National Hockey League* represents a

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4 *National Hockey League* is cited, followed or distinguished by the circuit courts of appeals as follows: First Circuit--56 cases; Second Circuit--42 cases; Third Circuit--44 cases; Fourth Circuit--35 cases; Fifth Circuit--45 cases; Sixth Circuit--63 cases; Seventh Circuit--66 cases; Eighth Circuit--23 cases; Ninth Circuit--94 cases; Tenth Circuit--45 cases; Eleventh Circuit--25 cases; DC Circuit--19 cases; and Federal Circuit--12 cases.

"depart[ure] from the accepted and usual course of judicial proceedings," and "call[s] for an exercise of this Court's supervisory power." SC Rule 10(a).

2. 'Set Aside' of Judgment With a Due Process Violation

In the pivotal case of *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Supreme Court unanimously held that the only "remedy" for a due process violation is to grant the "motion to set aside the decree and consider the case anew." *Id* at 552. "Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Id.* at 552.

Armstrong is cited, followed or distinguished in 3241 cases. Since 1965, the Supreme Court has cited *Armstrong* in 37 subsequent cases. The U.S.

courts of appeals have cited, followed or distinguished *Armstrong* in 568 cases.[5]

Undeniably, where *Armstrong* is cited in 3241 cases, and the Second Circuit avoided any discussion or mention of the controlling principles in *Armstrong*, such a radical "depart[ure] from the accepted and usual course of judicial proceedings," calls "for an exercise of this Court's supervisory power." SC Rule 10(a).

3. Second Circuit Ruling Raises "An Important Question of Federal Law" That Has Not Been Settled

Supreme Court Rule 10(c) provides that "[a] petition for a writ of certiorari will be granted" where "a United States court of appeals has decided an

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5 *Armstrong* has been cited, followed or distinguished in the courts of appeals as follows: First Circuit--13 cases; Second Circuit--29 cases; Third Circuit--26 cases; Fourth Circuit--18 cases; Fifth Circuit--29 cases; Sixth Circuit--26 cases; Seventh Circuit--33 cases; Eighth Circuit--21 cases; Ninth Circuit--35 cases; Tenth Circuit--31 cases; Eleventh Circuit--11 cases; DC Circuit--16 cases; and Federal Circuit--3 cases.

important question of federal law that has not been, but should be, settled by this Court." SC Rule 10(c).

In the case, the Second Circuit decided an important question over Federal Rule of Appellate Procedure 47(b), and concluded that a circuit court can enter a procedural default against a litigant, without furnishing any published "notice" requirements in its local rules.

FRAP 47(b) prescribes that:

> No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement. [FRAP 47(b)].

Despite this clear prohibition against an arbitrary and capricious enforcement of local rules, the Second Circuit has acted with impunity to "impose" the harsh "sanction" of a procedural default for "noncompliance," in which there is no *"actual*

notice requirements" in the local rules. From 2003 to 2008, the Second Circuit has turned a blind-eye to the notice deficiencies in its own local rules, causing a "party to lose rights." FRAP 47(b).

The Supreme Court has never decided this type of case, "but [clearly it] should." The Supreme Court has only mentioned FRAP 47(b)in three cases *in dicta*. The U.S. courts of appeals have only sparsely mentioned the language requirements of FRAP 47(b). To date, there has been no case on record on whether a court of appeals can impose a "sanction" or default, without "actual notice requirements." As it now stands this case represents a complete derogation of the congressional intent of FRAP 47(b), and it raises an "important question of federal law" that "should be settled by this Court." SC Rule 10(c).

VII. JUDICIAL CONFERENCE OF THE UNITED STATES HAS CONTROLLING INTERESTS UNDER 28 U.S.C. § 331

In 1922, Congress created the Judicial Conference of the United States, with the primary objective for framing uniform policy guidelines and making recommendations on a wide-range of rules, practices and procedures for the federal courts of the United States. Its specific enumerated responsibilities include to (1) "make a comprehensive survey of the condition of business in the courts of the United States," (2) "submit suggestions and recommendations to various courts to promote uniformity of management procedures," (3) "hold hearings, take sworn testimony, issue subpoenas and subpoenas *duces tecum*, and make necessary and appropriate orders in the exercise of its authority," and (4) recommend improvements to rules without

the force of law and "modify or abrogate any such rule so reviewed," or "found inconsistent in the course of such review." 28 U.S.C § 331.

The composition of the Judicial Conference consists of "the Chief Justice of the United States," as Chair, along with representative chief judges from all federal circuits, as well as other judicial experts and professors of law. The Chief Justice is authorized to appoint individuals to standing committees of the Conference, which, in turn, will "review rules prescribed under section 2071 . . . for consistency with federal law." *Id.*

A. Petitioner Requests Referral to the Judicial Conference for a Fact-Finding Study on Notice Deficiencies in the Local Rules of the Second Circuit

Where the United States Congress has specifically entrusted the Judicial Conference to "review rules prescribed under section 2071 . . . for

consistency with federal law," Petitioner respectfully requests that the Chief Justice refer this case to the appropriate rules and procedures committee of the Judicial Conference, for a fact-finding on whether the lack of notice procedures for pro se-to-counseled appeals in the Second Circuit are "consisten[t] with federal law." 28 U.S.C § 331.

Petitioner's request for review by the Judicial Conference is further appropriate where (1) the Supreme Court exercises "power" to "prescribe general rules of practice and procedure" for cases in the "courts of appeals," (2) Petitioner has shown that this matter satisfies the standard for review *Sibbach* and *Shady Grove Orthopedic*, (3) a fact-finding would satisfy the need for a "procedural safeguard" in this

case,[6] (4) an objective fact-finding would satisfy the requirements for the "due process of law," [7] (5) an objective fact-finding is in the public's best interest[8], and (6) the Supreme Court is authorized to "issue all writs necessary or appropriate in aid" of its "respective jurisdictions" under 28 U.S.C. § 1651(a).

Unquestionably, the assistance of the Judicial Conference in this fact-finding will greatly aid the jurisdiction of the Supreme Court in discharging its supervisory role under Section 2072(b). This is all

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6. The "controlling weight" in assessing the need for a "procedural safeguard," vis-à-vis protecting a constitutional right, is the "administrative burden" on the government. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). In this case, there is no "administrative burden" to have the Judicial Conference conduct a fact-finding on whether the local rules are "consisten[t] with federal law," since this is their appointed and statutory function under 28 U.S.C. § 331 anyways.

7. *See Caperton v. Massey*, 129 S.Ct. 2252, 2262 (2009)("Due process requires an objective inquiry" and "procedure for judicial factfinding.") (Justices Souter, Ginsburg and Breyer concurring in majority opinion).

8. *See Santosky v. Kramer*, 445 U.S. 745, 755 (1982) ("judicial factfinding" is in the best interests of society and "instructs degree of confidence our society thinks [it] should have in the correctness of factual conclusions").

the more true where the Supreme Court is busy with many pressing issues, and the time-requirement to undertake this fact-finding is not necessarily the best use of this Court's valuable resources or judicial staffing requirements.

If, during the course of this Judicial Conference review, it should be determined that the Local Rules of the Second Circuit furnish constitutionally-sufficient notice requirements for all litigants, then this Petition may be dismissed, without further review or action. Conversely, if, in the course of this review, it should be determined that there are notice deficiencies in the Local Rules of the Second Circuit, then the appropriate rule-making apparatus will already be engaged under 28

U.S.C §§2073-2077,[9] and the Supreme Court may then issue whatever writs are necessary to remedy outstanding due process violations, and work jointly with the Judicial Conference and the Second Circuit to recommend revisions or amendments to Congress, so that these local rules may be brought into compliance with 28 U.S.C § 2072(b).[10]

In either event, a fact-finding by the Judicial Conference will be authoritative, and it will fulfill this Court's supervisory "power" in ensuring the local rules of all U.S. courts of appeals are "consistent with Acts of Congress" and that these "rules shall not

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9 Section 2073 provides, in pertinent part, that "[t]he Judicial Conference may authorize the appointment of a standing committee to assist the Conference in recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and professional bar; and trial and appellate judges."

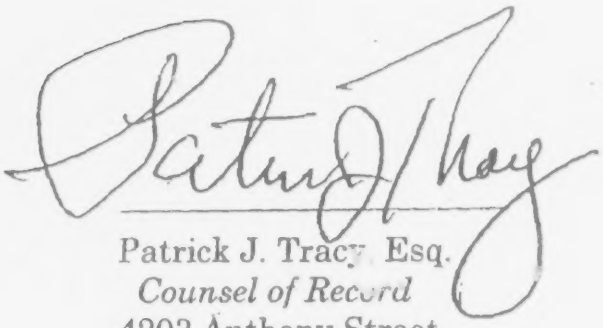
10. Alternatively, these "notice" discrepancies in the Local Rules of the Second Circuit could be brought to the attention of the Judiciary Committees of the United States Congress, specifically the House or Senate Subcommittees on The Constitution for hearings and enforcement legislation, where necessary.

abridge, enlarge or modify any substantive right," protected under the U.S. Constitution or Bill of Rights.

VIII. CONCLUSION

WHEREFORE, for all of the foregoing reasons, this Petition for Writ of Certiorari should be deferred, tabled and/or postponed, pending a referral by Chief Justice Roberts to the appropriate rules and procedure committee of the Judicial Conference of the United States, for a fact-finding and recommendation on this matter to the Supreme Court and the United States Congress, if necessary.

Respectfully submitted.



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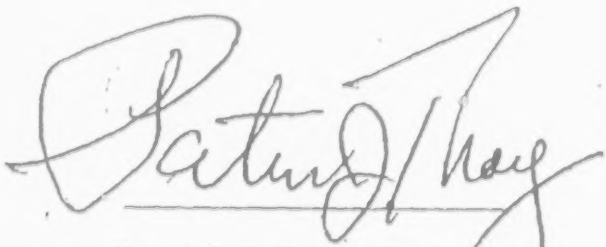
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33(1)(h) of the Supreme Court Rules, it is hereby certified that the word count of this petition is 2965 words. The word count was acquired on Microsoft Office Word 2007, to include footnotes. The word count excludes the text of constitutional provisions, statutes, and regulations, which is 758 words, as permitted under Rule 14 (1)(f) and Rule 33(1)(d).



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CERTIFICATE OF COMPLIANC

Pursuant to Rule 44 of the Supreme C

Rules, it is hereby certified that this Motion

Rehearing sets forth "intervening circumstan

substantial or controlling effect" or "other sut

grounds not previously presented."

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Supreme Court, U.S.
FILED

10-565 SEP 1 - 2010

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY P. L. TIBBETTS,
Petitioner

v.

JAMES DITTES, ET. AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the failure to furnish notice requirements for pro-se-to-counsel appeals in the Local Rules of the U.S. Court of Appeals for the Second Circuit violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution?

2. Does the failure to furnish notice requirements for pro se-to-counseled appeals in the Local Rules of the U.S. Court of Appeals for the Second Circuit violate the Equal Protection Clause of the Fifth Amendment, 28 U.S.C. § 2072 and Rule 47 of the Federal Rules of Appellate Procedure?

3. Where the U.S. Court of Appeals for the Second Circuit fails to furnish notice requirements for the adjudication of pro-se-to-counseled appeals, is the extraordinary writ of mandamus warranted to compel constitutionally sufficient notice?

4. Where the Second Circuit dismissed a pro se-to-counseled appeal without any published notice requirements, was FRAP 47 the controlling law, which requires that "no sanction" be "imposed" unless the alleged violator "has been furnished" with "actual notice of the requirement"?

5. Where a default was entered because of constitutionally insufficient notice requirements in the Second Circuit Local Rules, is the "remedy" for this due process violation to "set aside" the judgment and "wipe the slate clean"?

6. Where a single circuit judge "dismiss[ed]" and "determine[d]" an appeal, while it was pending before a over a substantive issue, is that single-judge order (a) "void" for violating the three-judge panel rule under FRAP 27(c)? (b) does that order invoke the 'law-of-the-case doctrine'? and (c) is that order binding upon a subsequent merit panel reviews?

7. Where the Second Circuit entered a default judgment without furnishing any published notice requirements, does the Due Process Clause of the Fifth Amendment prohibit an application of *res judicata* to Rule 60(b) challenges over this infirmity?

8. Can the Clerk of the Court authorize a court employee (deputy clerk) to "dismiss" or "determine" an appeal, and, if so, what procedural safeguards must be employed to ensure the appeal is dismissed in accordance with the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

Petitioner, Jeffrey P. L. Tibbetts, is a citizen of the Commonwealth of Virginia.

Respondents James Dittes, Dwayne Huebner, Thomas Ogletree, James Garrett, Harry Adams, Penelope Laurens, Detra MacDougall, and Yale University, are individual and corporate respondents, located or residing in New Haven, Connecticut.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i-ii

PARTIES TO THE PROCEEDINGS iii

TABLE OF AUTHORITIES CITED. viii

CITATION OF OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 2

I. STATEMENT OF CASE 3

INTRODUCTION. 3

II. COURSE OF PROCEEDINGS 7

A. Appeal Dismissed Without Notice Requirements 7

B. *Dittes* Challenged for "Voidness" in the U.S. District Court 13

C. Court Applies *Res Judicata* to Extinguish Due Process Challenges in *Dittes II* and *Dittes III*. 15

D. *Dittes Amendments* 17

E. Second Circuit Declines to Recall Mandate in *Dittes* 18

III. ARGUMENT 22

A. FAILURE TO FURNISH "NOTICE" REQUIREMENTS FOR PRO SE-TO-COUNSELED APPEALS VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION..... 22

(1). Second Circuit Fails to Furnish "Notice" Requirements for Pro Se-to-Counseled Appeals 25

(2). Test for Due Process Violation .. 26

(3). Petitioner Satisfies Due Process "Test" 28

B. GOVERNMENT'S INSUFFICIENT "NOTICE" RAISES 'VOID FOR VAGUENESS DOCTRINE' 30

C. INSUFFICIENT "NOTICE" FOR A CLASS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT 33

IV. REASONS FOR GRANTING WRIT 36

1. REMEDY" FOR DUE PROCESS VIOLATION IS TO SET ASIDE THE OFFENDING JUDGMENT 36

2. EXTRAORDINARY WRIT IS WARRANTED TO CORRECT DUE PROCESS DEFECTS IN SECOND CIRCUIT 40

(A) Mandamus is Warranted Under 28 U.S.C. § 1651 43

3. FOUR ISSUES MUST BE REVIEWED IN THE SECOND CIRCUIT LOCAL RULES 47

4. LOCAL RULES VIOLATE FRAP. .51

5. DITTES IS INCONSISTENT WITH FEDERAL LAW..... 54

(A) Dittes is Inconsistent with Second Circuit Case Law . 56

6. RES JUDICATA SHOULD NOT EXTINGUISH DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT 59

7. SECOND CIRCUIT'S LOCAL RULES CREATE INCONSISTENT APPLICATION OF DUE PROCESS AMONG CIRCUIT COURTS 61

V SUMMARY 63

VI. CONCLUSION 66

APPENDIX

Appendix A: U.S. Court of Appeals: Analysis of Pre-Docketing Requirements

Appendix B: "How to Appeal Your Civil Case"

Appendix C: Second Circuit Form C (Pre-Argument Statement)

Appendix D: Second Circuit Form D (Transcript Information)

Appendix E: Second Circuit Dismissal Mandate Tibbetts v. Dittes, 01-7377, Sept. 16, 2003

Appendix F: Second Circuit Civil Appeals Management Plan

Appendix G: Second Circuit Order, Denying Motion to Reinstate *Dittes,* Judge Reena Raggi, Dated Dec. 8, 2003

Appendix H: U.S. District Court, *Tibbetts v. Dittes* (*Dittes II*), Order Dismissing Rule 60(b)(4) Motion, Dated Jan 5, 2005.

Appendix I: U.S. District Court, *Tibbetts v. Dittes* (*Dittes III),* Order Dismissing Rule 60(b)(3) Motion, Dated Jan 5, 2005.

Appendix J: Second Circuit Summary Order, *Tibbetts v. Dittes (Dittes III),* Dated Feb. 16, 2006.

Appendix K: Second Circuit Summary Order, *Tibbetts v. Dittes (Dittes II),* Dated Aug. 10, 2006.

Appendix M: Motion to Recall Mandate for Due Process Violations in *Dittes, Tibbetts v. Levin* 05-5826 CV(L), Table of Contents of Memorandum of Law.

Appendix N: Second Circuit Revised Form C (2010)

Appendix O: Servicemembers Civil Relief Act (SCRA), U.S. Army Documents for Stay and Tolling, Pursuant to 50 U.S.C. § 522.

TABLE OF AUTHORITIES

CASES

Arnett v. Kennedy,
416 U.S. 134 (1974) 46

Armstrong v. Manzo,
380 U.S. 545 (1965) 44, 53-57

Baldwin v. Hale,
68 U.S. (1 Wall.) 223 (1861) 24

Baldwin v. Am.Surety Co., 287 U.S. 156 (1932) . . . 59

Barnhart v. Walton,
535 U.S. 212 (2002) 33

Bd of Regents v. Roth,
408 U.S. 564 (1972) 26-27

Bolling v. Sharpe,
347 U.S. 497 (1954) 34

Calloway v. Marvel Entertainment Group,
854 F.2d 1452 (2d Cir. 1988) 57

Califano v. Webster,
430 U.S. 313 (1977) 35

Champlin Refining Co. v. Commission,
286 U.S. 210 (1932) 27

Cleveland Bd. of Education v. Loudermill,
470 U.S. 532 (1985) 28

Cline v. Frink,
274 U.S. 445 (1927) 33

City of Boerne v. Flores,
521 U.S. 507 (1997) 31

City of Chicago v. Morales,
527 U.S. 41 (1999) 30-32

Coe v. Armour Fertilizer Works,
237 U.S. 413 (1915) 40

Connally v. General Constr. Co.,
269 U.S. 385 (1926) 32

Currin v. Wallace,
306 U.S. 1, 13 (1939) 33

De Beers Consolidated Mines v. United States,
325 U.S. 212 (1945) 44

Detroit Bank v. United States,
317 U.S. 329 (1943) 33

Eastland v. U.S. Servicemembers' Fund,
421 U.S. 491 (1975) 29-30

Elrod v. Burns,
427 U.S. 347 (1976) 29

Fox. v. Amtrak,
241 Fed. Appx. 771 (2d Cir. 2007) 56

Frazier v. Heebe,
482 U.S. 641 (1987) 55

Fed Dept. Stores, v. Moitie, 452 U.S. 394 (1981). . . 60

Friends of Earth v. Reilly,
966 F.2d 690 (D.C. Cir. 1992) 50

Fuentes v. Shevin,
407 U.S. 67 (1972) 24, 25, 50

Gaines v. Kelly,
202 F.3d 598 (2d Cir. 2000) 58

Giaccio v. Pennsylvania,
382 U.S. 399 (1966) 30, 32

Gilroy v. Erie Lackawanna R.R. Co.,
421 F.2d 1321 (2d Cir. 1970) 56

Gray v. Netherland,
518 U.S. 152 (1996) 40

Grayned v. City of Rockford,
408 U.S. 104 (1972) 34

Green v. Lindsey,
456 U.S. 444 (1982) 45

Hamdi v. Rumsfield,
542 U.S. 507 (2004). 65

Hammond Packing Co. v. Arkansas,
212 U.S. 322 (1908). 53

Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 25

Harris v. Hardeman,
55 U.S. 334 (1853) 23

Hormel v. Helvering,
312 U.S. 552 (1941) 53

Hovey v. Elliott, 167 U.S. 409 (1897). 58

Hudson v. Parker, 156 U.S. 277 (1895) 63

In Re Ruffalo,
390 U.S. 544 (1968) 47

Joint Anti-Facist Refugee Comm. v. McGrath,
341 U.S. 123 (1951) 49

Kremer v. Chemical Const. Corp.,
456 U.S. 461 (1982) 59

Lankford v. Idaho,
500 U.S. 110 (1991) 23

Lazetta v. New Jersey,
306 U.S. 451 (1939) 31

LeBoeuf, Lamb, Greene & MacRae v. Worsham Group, Inc.,
185 F.3d 61 (2d Cir. 1999) 56

Locke v. Allstate Ins. Co.,
696 F.2d 1340 (11th Cir. 1983) 50

Logan v. Zimmerman Brush Co.
455 U.S. 422 (1982) 25

Mathews v. Eldridge,
424 U.S. 319 (1976) 28, 30

McVeigh v. United States,
78 U.S. 259 (1871) 23

Memphis Light, Gas & Water Div. v. Craft,
436 U.S. 1 (1978) 40

Metzen v. United States,
19 F.3d 795 (2d Cir. 1994) 57

Morrissey v. Brewer,
408 U.S. 471 (1972) 27

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 23, 37

National Hockey League v. Metropolitan Hockey Club,
427 U.S. 639 (1976) 54

New York Times Co. v. United States,
403 U.S. 713 (1971). 29

Old Wayne Mutual Life Assn. v. McDonough,
204 U.S. 8 (1907) 61

Parke v. Raley, 506 U.S. 20 (1992) 60

Peralta v. Heights Med. Center, Inc.,
485 U.S. 80 (1988) 39, 40

Pennoyer v. Neff,
95 U.S. 714 (1878) 22

Postal Telegraph Cable Co. v. Newport,
247 U.S. 474 (1918) 61

Riverside and Dan River Cotton Mills v. Menefee,
237 U.S. 189 (1915) 58

Robinson v. Hanrahan,
409 U.S. 38 (1972) 26

Roche v. Evaporated Milk Assn.,
319 U.S. 21, 26 (1943) 44

Russello v. United States,
646 U.S. 16 (1983) 32

Schroeder v. City of New York,
371 U.S. 208 (1962) 58

Societe Internationale v. Rogers,
357 U.S. 197 (1958) 52, 55

Solesbee v. Balkcom,
339 U.S. 9 (1950) 65

Stanley v. Illinois,
405 U.S. 645 (1972) 64, 65

Steward Machine Co. v. Davis,
301 U.S. 548 (1937) 34

Stickney v. Wilt,
90 U.S. 150, 23 Wall 150 (1874) 53

Tennessee v. Lane,
541 U.S. 509 (2004) 34

Ticor Title Ins. Co. v. Brown,
114 S.Ct. 1359 (1994). 63

Tulsa Professional Collection Servs., Inc. v. Pope,
485 U.S. 478 (1988) 26

United States v. $ 8,850,
461 U.S. 555 (1983) 22

United States v. All Assets of Statewide Auto Parts,
971 F.2d 896 (2d Cir. 1992) 57

United States v. Cohen Grocery Co.,
255 U.S. 81 (1921). 32

United States Dep't of Agriculture v. Murry,
413 U.S. 508 (1973) 64

Vitek v. Jones,
445 U.S. 480 (1980) 46

Washington v. Davis,
426 U.S. 229 (1976) 35

Woodford v. Ngo,
548 U.S. 81 (2006) 54,55

CONSTITUTION:

U.S. Const., Art. III. 1, 41

U.S. Const., amend V. . . . . *Passim*

STATUTES

28 USC § 46(c) 20, 50
28 U.S.C. § 1651(a) 44
28 U.S.C. § 2071 . . . . . *Passim*
28 U.S.C. § 2072 . . . . . 3, 53

FEDERAL RULES OF APPELLATE PROC.

FRAP 27(c) 2, 13, 50
FRAP 47 (a)(b) 2, 51, 52, 54, 64

FEDERAL RULES OF CIVIL PROCEDURE

F.R.Civ.P. Rule 60(b)(3) 14
F.R.CIV.P. Rule 60(b)(4) 14

OTHER

USCS Fed Rules App Proc R 27 57
Second Circuit Local Rule 6(c) 12, 13
Moore's Federal Practice 3d, Local Rules
by Courts of Appeals, § 347.10 (1997). 51
Black's Law Dictionary,
West Group (7th Ed., 1999) 63

CITATION OF OPINIONS BELOW

This Petition seeks review of the Motion to Recall the Mandate for Due Process Violations in *Tibbetts v. Dittes* (01-7377). A single circuit judge denied the motion on December 19, 2008. The opinion is reprinted in the Appendix to the Petition ("Pet. App.") at 1a 5-7.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to Article III of the Constitution, 28 U.S.C. § 1254(1), and 28 USC § 2071. The judgment from the U.S. Court of Appeals for the Second Circuit was entered on December 19, 2008.

On the date of this decision, Petitioner was on active military duty. Petitioner's active-duty service included training and overseas mobilization in support of Operation Iraqi Freedom, from October

18, 2008 to June 6, 2010. A copy of Petitioner's official DD Form 214 is attached at Appendix O.

Under the provisions of the Servicemembers' Civil Relief Act (SCRA), Petitioner's active duty service is tolled under 50 U.S.C. § 522. Accordingly, the present petition was filed on 3 September 2010, within 90 days of the tolled date of June 6, 2010, and is timely pursuant to 28 U.S.C. § 1257 and Rule 10(1)(c) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Due Process Clause of the Fifth Amendment. The petition also involves 28 USC § 2071 (Rules Enabling Act), FRAP 27(c) (Power of a Single Judge to Entertain a Motion), and FRAP 47 (Notice Requirements in Local Rules). The pertinent sections of these provisions and statutes are reproduced in the Appendix at Pet. App. 1a 1-4.

I. STATEMENT OF THE CASE

INTRODUCTION

In 1975, Congress directed the United States Courts of Appeals to implement local rules of practice and procedure, pursuant to 28 U.S.C. § 2071. Congress vested the Supreme Court with supervisory authority to ensure the courts' local rules did not "abridge, enlarge or modify any substantive right," and that they remain "consistent with Acts of Congress." 28 U.S.C. § 2072.

Shortly thereafter, thirteen federal circuit courts promulgated local rules and practices. The U.S. Court of Appeals for the Second Circuit, for its part, implemented the Second Circuit Local Rules ("Local Rules"), the Civil Appeals Management Plan ("CAMP") and pre-docketing Forms C and D. The implementation of these Local Rules were intended to further the scope of the Federal Rules of Appellate

Procedure ("FRAP") and to assist the busy docketing requirements of the Second Circuit Clerk's Office.

In 2007, the Second Circuit had 8,533 appeals (6,334 counseled appeals and 2,199 pro se appeals). In the course of pro se appeals, if an appellant retains counsel *after* the appeal is docketed, the Clerk's Office will administratively effect a "status transfer" from a 'pro se appeal' to a 'counseled appeal' (hereinafter "pro se-to-counseled" appeals). In 2007, the Second Circuit had 116 pro se-to-counseled appeals.[1]

Pro se-to-counseled appeals exist in varying degrees in all federal and state circuit courts.[2] Eleven federal circuits utilize post-docketing forms to

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[1] Statistic from the Second Circuit Executive Office.

[2] In the Second Circuit, civil and criminal counseled appeals constitute the largest appellate category with 74% of the total filings, pro se appeals at 25%, and pro se-to-counseled appeals at approximately 1%.

conduct the adjudication of these appeals. Post docketing means all forms to adjudicate the appeal are required after the appeal is docketed in the circuit court.

The Second Circuit, however, relies upon *pre-docketing* forms (namely Forms C and D), which must be filed *before* the appeal is docketed. The Second Circuit's emphasis on *pre-docketing* forms becomes inherently problematic in pro se-to-counseled appeals because there are no "notice" guidelines furnished in the Second Circuit Local Rules. This "notice" vacuum rises to the level of a constitutional magnitude where, as here, the Second Circuit dismissed a pro se-to-counseled appeal without furnishing any constitutionally sufficient "notice" requirements.

In January 2010 the Second Circuit amended and revised its Local Rules, in accordance with 28

U.S.C. § 2071, but neglected to implement or furnish any notice requirements for the adjudication of pro se-to-counseled appeals. Based on this recent revision to the Local Rules, it is apparent that the Second Circuit does not intend to furnish notice requirements as to how the use of these pre-docketing forms apply to this smallest category of appellate adjudication(s).

This Petition for Certiorari provides a test case for whether the Second Circuit furnishes constitutionally sufficient "notice" requirements for the adjudication of pro se-to-counseled appeals. If it is true that "notice" information is not furnished in the Local Rules for this appellate category, then the Second Circuit's ongoing adjudication, and occasional dismissal, of pro se-to-counseled appeals violates the Due Process and Equal Protection Clauses of the Fifth Amendment of the U.S. Constitution.

II. COURSE OF PROCEEDINGS

A. Appeal Dismissed Without "Notice" Requirements

On March 29, 2001, Petitioner appealed the judgment in *Tibbetts v. Dittes* (05-00995 CV) from the U.S. District Court for the District of Connecticut to the U.S. Court of Appeals for the Second Circuit. Pet. App. at 1a 9-11. Petitioner did not have legal representation at the time, thus, he filed pro se. The Clerk's Office docketed this pro se appeal as *Tibbetts v. Dittes* (01-7377) (hereinafter "*Dittes*").

In the Second Circuit's adjudication of pro se appeals, "[t]he requirement for filing pre-argument statements (forms C . . . and D) is waived." App. B, *infra* at 1. In counseled appeals, Forms C[3] and D[4]

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[3] *See* Form C (Pre-Argument Statement), App. C *infra* at 1.

[4] *See* Form D (Transcript Information), App. D *infra* at 1

must be filed within ten (10) days of the "Notice of Appeal."[5]

Ten months after *Dittes* was docketed, on March 29, 2002, Petitioner retained counsel. Petitioner's new counsel (John Nugent) was unable to locate any guidelines in the Second Circuit publications regarding how to administratively *transfer* a pro se appeal to a counseled appeal. Upon contacting the Second Circuit Clerk's Office ("Clerk's Office"), he was instructed to file a "notice of appearance" and await the issuance of a revised scheduling order. The Clerk's Office did not instruct him to file Forms C and D. Shortly thereafter, on April 2, 2001, the Clerk's Office sent Mr. Nugent a "Civil Case Package," which contained seven official publications for the Second Circuit. Notably absent

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[5] The Second Circuit revised its ten (10) day filing requirement to fourteen days in the 2010 Revised Local Rules.

in this "Civil Case Package" was any requirement that counsel file Forms C and D in pro se appeals.[6]

When the Clerk's Office failed to issue the scheduling order, on June 13, 2003, Appellees moved to dismiss the appeal on the grounds that new counsel had failed to file Forms C and D. Appellees cited no local rules in support of this position. In response thereto, Petitioner's counsel affirmed by affidavit that he had done everything instructed of him by the Clerk's Office: He filed his "notice of appearance," and he was awaiting issuance of the new scheduling order, as instructed.

On September 9, 2003, the Clerk's Office *sua sponte* dismissed *Dittes* for *failure to file Forms C*

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6 "Civil Case Package" is contained in the record below.

and D. The dismissal mandate was signed by Deputy Clerk, Tammy Martinez.[7]

It stated as follows:

> The Civil Appeal Management Plan of this Court Directs that within the (10) days after filing a Notice of Appeal, the Appellant shall file and serve a Pre-Argument Statement (FORM C), order a transcript of the proceedings from the court reporter and file and serve a statement concerning same (FORM D), pay docketing fee, and, that in the event of default of any of these requirements, the Clerk may dismiss the appeal without further notice. The appellant herein not having so proceeded, upon consideration thereof, it is ordered that the appeal from the order of 3/22/01 United States District Court for the District of Connecticut New Haven be and it hereby is dismissed. [App. E, *infra* at 1].

The Deputy Clerk used the *wrong* mandate to dismiss *Dittes*. The mandate was defective for at least three reasons:

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[7] There is no evidence the Clerk, Roseanne McKechnie, reviewed or approved this *sua sponte* dismissal by the deputy clerk. On its face, the dismissal *only* confirms that a deputy clerk had "authority" to dismiss the appeal, on behalf of the Clerk of the Court.

1. This mandate only applies to "counseled" appeals filed at the district court level. As already noted above, at the time of this filing and docketing, *Dittes* was *not* a counseled appeal; it was a pro se appeal. The Second Circuit had "waived" the requirement for filing Forms C and D in *Dittes*. Thereafter, the Second Circuit does not provide any published notice that counsel in a pro se appeals must file Forms C and D, which were already "waived." Without "notice" that counsel must *retroactively* file Forms C and D (to the date of the Notice of Appeal in the district court) the above mandate used to dismiss *Dittes* was inapplicable and inconsistent with the pre-docketing requirements in the Local Rules.

2. Next the above mandate required absurd filing deadlines. In *Dittes*, the Notice of Appeal was filed on March 29, 2001. Mr. Nugent

entered his notice of appearance a year later on March 29, 2002. However, under the defective provisions and language of this mandate, Mr. Nugent would have had to file Forms C and D within ten (10) days of the Notice of Appeal, even though he did not enter his appearance until a year later on March 29, 2002!

3. Finally, the deputy clerk *failed* to follow Local Rule (LR) 6(c), which requires that preliminary "notice" of an administrative deficiency be furnished *before* an appeal can be defaulted. LR 6(c) provides that:

> In the event of default in any action . . . the Clerk shall issue *a notice to the appellant* that the appeal will be dismissed unless, within ten days thereafter, the appellant shall file an affidavit showing good cause for the default and indicating when the required action will be taken." [App. F, *infra* at 1 (emphasis added)].

The Clerk's Office made no effort to comply LR 6(c).

On October 16, 2003, Petitioner filed a motion to re-instate *Dittes*. He argued there was a double "notice" infraction. First, there was no published notice in the Local Rules *negating* the "waiver" of Forms C and D in pro se appeals, should an appellant retain counsel. Second, the deputy clerk failed altogether to issue required *notice* of an alleged administrative infraction under LR 6(c).

Then Petitioner's motion to reinstate the appeal was inadvertently placed before a single circuit judge. Under Local Rule 27(c) and FRAP 27(c), this substantive motion should have been placed before a three-judge panel.[8] On December 8, 2003, a single judge (the Hon. Reeni Raggi) denied

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[8] Motions addressed to the "recall or modification of any mandate or decision of the court" shall be referred "to the [panel of] judges." LR 27(c). The Clerk's Office violated this local rule. Petitioner's motion to reinstate *should have been placed* before the three-judge panel of February 13, 2002. *See* entry in Second Circuit Docket in complete record below.

the motion without explanation or findings of fact.[9] App. G, *infra* at 1.

B. *Dittes* is Challenged for "Voidness" in the U.S. District Court

On June 28, 2004, Petitioner filed in the U.S. District Court for the District of Connecticut a Rule 60(b)(4) Motion, under the Federal Rules of Civil Procedure ("F.R.Civ.P."), challenging the Second Circuit's dismissal of *Dittes* on the grounds of constitutional "void[ness]".[10] The Rule 60(b)(4) motion was filed in the underlying action of *Dittes* (hereinafter *Dittes II*).

Four months later, Petitioner filed a Rule 60(b)(3) Motion, collaterally attacking the unfairness

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[9] It is debatable whether Judge Raggi's single-judge order was binding. FRAP 27(c) clearly prohibits a single judge from "dismiss[ing] or otherwise determin[ing] an appeal."

[10] Rule 60(b)(4) provides that "on motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . .[when] the judgment is void."

of the underlying *Dittes* trial (hereinafter "*Dittes III*"). This motion, also filed in the U.S. District Court, challenged the court's refusal to allow Petitioner's counsel to conduct the trial. Instead the district court forced Petitioner to conduct his own trial pro se. Undeniably, *Dittes III* would have constituted the direct appeal of *Dittes*—if that appeal had not been dismissed over a due process violation.

On January 5, 2005, the district court summarily dismissed *Dittes II* and *Dittes III*. The district court dismissed *Dittes II* (due process challenge) on the grounds that the district court has "no authority to review a decision of the United States Court of Appeals for the Second Circuit[.]" App. H, *infra* at 1. The district court also dismissed *Dittes III* (collateral attack over fairness) on the grounds of res judicata. "[P]laintiff had the opportunity to raise[] the issues on appeal, but failed

to do so," thus, he "is now 'barred by principles of res judicata and the interest of finality of judgments from mounting a collateral attack on a prior judgment in the present action." App. I, *infra* at 1.

B. Court Applies *Res Judicata* to Extinguish Due Process Challenges in *Dittes II* and *Dittes III*

On February 4, 2005, Petitioner appealed *Dittes II* and *Dittes III* to the Second Circuit. The appeals were not consolidated; they were heard separately before different panels.

On February 16, 2006, the Second Circuit issued a summary affirmance in *Dittes III* (collateral attack) that Petitioner had failed to present any "highly convincing evidence" to grant a motion "to vacate the judgment as void." App. J, *infra* at 1. The panel declined to investigate the "notice" discrepancies in the Local Rules.

Six months later, on August 10, 2006, the Second Circuit issued a four-sentence summary affirmance in *Dittes II* (due process challenge). The panel claimed the appeal was "without merit," App. K, *infra* at 1, but made no effort to inquire into the "notice" issues in the Local Rules.

On February 3, 2006, Petitioner's counsel sent letters to the Second Circuit Rules Committee, as well as the Clerk's Office, requesting that public notice be furnished hereafter in future pro se-to-counseled appeals. App. L, *infra* at 1-8. The Second Circuit declined to answer or provide any reasonable requests for "notice" information.

D. *Dittes Amendments*

The Second Circuit's surprise default in *Dittes* created a "domino effect" for the stayed litigation pending below. While *Dittes II* and *Dittes III* were still on review by the Second Circuit, the district

court entered a stay in the pending amendments in *Dittes.*[11] When the Second Circuit issued summary affirmances in *Dittes II* and *Dittes III*, the district court then dismissed the *Dittes Amendments* on the grounds of *res judicata.*

E. Second Circuit Declines to Recall Mandate in *Dittes*

Petitioner appealed the *Dittes Amendments* to the Second Circuit. On appeal, the Second Circuit consolidated the *Dittes Amendments* into two separate appeals: *Tibbetts v. Levin* (05-5826-CV(L) and *Tibbetts v. President and Fellows of Yale College* (05-5780-CV). A month-and-a-half prior to oral argument for this appeal, on July 7, 2008, Petitioner

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[11] The district court had invited the pro se plaintiff to file amendments in the *Dittes* complaint *without* providing a time frame as to when they were due. Plaintiff filed his amendments (42 days later), but the court disallowed them. Petitioner then filed the amendments as new causes of action to protect the statute of limitations. The court subsequently ruled these amendments warranted separate discovery and trials (hereinafter *"Dittes Amendments"*).

filed a Motion to Recall the Mandate in *Dittes* for Due Process Violations.[12] Petitioner requested that the panel hearing the *Dittes* Amendments *first* rule on the Motion to Recall the Mandate, so as to not compound the ongoing constitutional errors in *Dittes*.

Judge Reeni Raggi was presiding judge for this three-judge panel. On August 7, 2008, the panel *declined* to hear the Motion to Recall the Mandate as "moot," and instead summarily affirmed the district court's application of *res judicata*. The panel cited with approval its decisions in *Dittes, Dittes II,* and *Dittes III*.[13] Meanwhile, the Motion to Recall the Mandate remained untouched on the court's docket.

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[12] This motion to recall the mandate was filed simultaneously in *Dittes* and the pending *Dittes* Amendments. The supporting memorandum was 84 pages long. *See* App. M, *infra* 1-4.

[13] Opinion reprinted at *Tibbetts v. Levin*, 288 Fed. Appx. 743 (2d Cir. 2008)(unpublished).

Four months later, Judge Raggi inexplicably carved away the Motion to Recall the Mandate from the panel hearing the second *Dittes Amendment* (*Tibbetts v. President and Fellows of Yale College* (05-5780-CV)). In so doing, two sitting judges were *denied* the opportunity to review the underlying due process issues in *Dittes*. On December 19, 2008, the panel blindly issued an opinion that *res judicata* also had proper preclusive effect in the second *Dittes Amendment*.[14]

That same date, December 19, 2008, Judge Raggi separately ruled on the Motion to Recall the Mandate holding there was "no merit in the due process claims asserted in the motion." Pet. App. at 1a 5-8. Judge Raggi made no investigation into the Local Rules, but concluded nonetheless that lack of

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[14] Opinion reprinted at *Tibbetts v. President & Fellows*, 303 Fed. Appx. 935 (2d. Cir 2008).

notice does not present "exceptional circumstances justifying the exercise of this court's power to recall a mandate."[15] *Id.* Judge Raggi finished the ruling with an injunction. Petitioner was permanently enjoined from making any further challenges regarding the lack of "notice" requirements in the Second Circuit Local Rules --short of a petition "to the Supreme Court of the United States." *Id.*

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[15] Judge Raggi's order, dated 19 December 2008, constituted the sixth time the court declined or failed to investigate "notice" defects in the Local Rules. The six times are listed as follows: *Dittes* (Dec. 8, 2003); *Dittes III* (Feb. 16, 2006); *Dittes II* (Aug. 10, 2006); *Dittes Amendments (Levin)* (Aug. 7, 2008); *Dittes Amendments* (*President and Fellows*) (Dec. 19, 2009); and *Dittes* (Motion to Recall Mandate) (Dec. 19, 2008).

III. ARGUMENT

A. FAILURE TO FURNISH "NOTICE" REQUIREMENTS FOR PRO SE-TO-COUNSELED APPEALS VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amend V. The essential maxim of the "due process of law" is that "individuals must receive notice and an opportunity to be heard before the government deprives them of property." *United States v. $ 8,850*, 461 U.S. 555, 562, n.12 (1983); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

A party whose rights are to be substantially affected is entitled to be heard, and in order that he may enjoy that "right," he or she must first be

"notified." *Lankford v. Idaho*, 500 U.S. 110 (1991). Similarly, the right to *notice* "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Acknowledging this universal principle of jurisprudence, the Court observed:

> From the days of Magna Carta. . . and down to the present time, due process of law includes *actor, reus,* and *judex*; and how is anybody to be *judex* unless he hears?" [*McVeigh v. United States*, 78 U.S. 259, 265 (1871) (quoting *Harris v. Hardeman*, 55 U.S. 334 (1853)

In any situation regarding government-sponsored deprivation, the government must furnish "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 315.

Further, this requirement must be undertaken in good faith, for "when notice is a person's due, process which is a mere gesture is not due process." 339 U.S. 315.

In order to pass constitutional muster, "notice" must state 'where' and at 'what time' a party is to proceed; it must also provide the "legal consequences [that] may ensue" for a failure to act. *Fuentes v. Shevin,* 407 U.S. 67 (1972). Once an interested party has been notified of governmental action, he or she is entitled to be heard:

> The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property[.]

407 U.S. at 80-81 (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1861). Thus the Due Process Clause forbids the government from "extinguish[ing]"

property rights without first affording "notice" and "the opportunity for a hearing on the merits of his cause." *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 429 (1982); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

(1). Second Circuit Fails to Furnish "Notice" Requirements for Pro Se-to-Counseled Appeals

The Second Circuit Local Rules do not furnish "notice" requirements of "where" or "at what time" pro se-to-counseled appellants are to proceed. *Fuentes,* 407 U.S. at 81. Nor do the Local Rules provide the "consequences" of a "failure to act." *Id.*

Indeed, the Local Rules are completely silent as to how Forms C and D apply in pro se-to-counseled appeals, if they even apply at all. Initially, the Second Circuit "waives" the requirement of Forms C and D in pro se appeals, but in pro se-to-counseled appeals, the Second Circuit

effectively seeks to revoke this waiver *without furnishing any published notice requirements.* These arbitrary "notice" requirements *cannot* pass "constitutional muster." *Robinson v. Hanrahan,* 409 U.S. 38, 40 (1972) (government made no "effort to provide notice which was 'reasonably calculated' to apprise [petitioners] of the pendency of [judicial] proceedings.").

(2). Test for Due Process Violation

When a claimant invokes the Due Process Clause, there must be a showing that (a) the claimant has a protected liberty or property interest and (b) that the government has deprived the petitioner of a protected liberty or property interest. *Bd. of Regents v. Roth,* 408 U.S. 564 (1972).

Here, the Petitioner had protected property rights in the appeal of *Dittes* as a "cause of action." *Tulsa Professional Collection Servs., Inc. v. Pope*, 485

U.S. 478, 484 (1988) ("a cause of action is a species of property protected by . . . the Due Process Clause"). Property interests protected "by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents,* 408 U.S. at 564. Finally, there can be no question that the Second Circuit acted to deprive the Petitioner of his opportunity to pursue his appeal. As the Supreme Court noted in *Armstrong v. Manzo,* "there can be no doubt, where as here, the result of that judicial proceeding was permanently to deprive" the petitioner of a property right." 380 U.S. 545, 551 (1965); *Champlin Refining Co. v. Comm.*, 286 U.S. 210, 242-243 (1932) (same).

As a final threshold issue, due process must also be "flexible," calling "for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

"Once it is determined that the Due Process Clause applies, the question remains what process is due." 408 U.S. at 481 (emphasis added). Here the question of "what process is due" is certainly *not* to be found in the Second Circuit Local Rules.

(3). Petitioner Satisfies the Due Process "Test"

Where the government acts to deprive individuals of protected interests or rights, the government must furnish certain procedural safeguards *prior* to the act of deprivation. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). In *Mathews*, the Court established a tri-partite test to evaluate the procedural due process safeguards, to include: (1) the "private interests" affected, (2) the risk of "erroneous deprivation," and (3) the "government's interest" and burden in implementing the procedural safeguards. 424 U.S. at 335; *Cleveland Bd. of*

Education v. Loudermill, 470 U.S. 532, 542 (1985) (applying tri-partite test).

Petitioner satisfies the *Mathews* test. First, he can show his property interest was adversely affected "by the official action" of the U.S. Court of Appeals for the Second Circuit. 424 U.S. at 335. Secondly, Petitioner has borne "the risk of an erroneous deprivation." The Supreme Court has repeatedly emphasized that where there is an erroneous deprivation, the "loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713, (1971)). In this case, Petitioner has been "erroneous[ly] depriv[ed]" of a property right for seven years, from 2003 to the present. To any reasonable mind, a seven-year deprivation constitutes an "irreparable injury."

Eastland v. U.S. Servicemembers' Fund, 421 U.S. 491, 495 (1975).

Finally, there must be an analysis of the "government's interest" and any financial or administrative burden to implement procedural safeguards. *Mathews*, 424 U.S. at 335. In this circumstance, it is inconceivable that the Second Circuit would be *prejudiced* with additional administrative "burdens" in furnishing notice of "procedural requirement[s]" in its Local Rules for pro se-to-counseled appeals.

B. GOVERNMENT'S INSUFFICIENT "NOTICE" RAISES THE 'VOID FOR VAGUENESS DOCTRINE'

The Supreme Court has ruled that where there is an insufficient degree of government "notice" to citizens, the Due Process Clause embodies a "void-for-vagueness" doctrine. *City of Chicago v. Morales*, 527 U.S. 41 (1999). In *Morales*, a government rule

"fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." 527 U.S. at 56 (citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)). "The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *Morales*, 527 U.S. at 56.

Stated another way, American citizens "are entitled to be informed as to what the [government] commands or forbids." *Lazetta v. New Jersey*, 306 U.S. 451, 453 (1939). The 'void-for-vagueness' doctrine applies to *any government law or statute* that is "so vague" as to leave the public "without knowledge of the nature of the activity that is prohibited." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

In this case, the failure to provide guidance in the Local Rules as to whether Forms C and D apply in pro se-to-counseled appeals is "so vague as to what the [government] commands or forbids," that "it leaves the public uncertain as to the conduct it prohibits." *Morales*, 527 U.S. at 56; *Giaccio*, 382 U.S. at 402. The Second Circuit's Revised Local Rules for 2010 fare no better; they still fail to furnish "notice" requirements as to "how" or "where" Forms C and D should apply in pro se-to-counseled appeals.[16]

Under current federal law, where there is government omission or "silence" regarding the applicability of rules or laws, it generally means that

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[16] Any rule that "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, (1926).

the act is "not required."[17] Moreover, any government rules effecting the public interest will not be granted "institutional deference," especially where such ambiguities produce "constitutional harm." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *Cline v. Frink,* 274 U.S. 445, 458 (1927).

C. INSUFFICIENT "NOTICE" FOR A CLASS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

Although the Fifth Amendment does not contain a *per se* "equal protection clause," it does restrain the government from actions that are so "discriminatory" as to amount "to a complete denial of due process." *Detroit Bank v. United States*, 317

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[17] The general rule is that where the government "includes particular language in one section of a [rule] but omits it in another section . . . , it is generally presumed that [the government] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 646 U.S. 16 (1983); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921).

U.S. 329 (1943); *Currin v. Wallace,* 306 U.S. 1 (1939). The "concepts of equal protection and due process, both stemming from our American ideal of fairness," are not mutually exclusive and/or interchangeable, but it will act to *forbid* the government from any discriminatory conduct that is so "unjustifiable" as to be "violative of due process." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954) (citing *Steward Machine Co. v. Davis,* 301 U.S. 548, 585 (1937)).

In challenges under the Equal Protection Clause, where there is governmental "vagueness," the court must apply "strict scrutiny" to the government's discriminatory scheme. *Tennessee v. Lane*, 541 U.S. 509 (2004); *Califano v. Webster*, 430 U.S. 313 (1977) ("strict scrutiny" applies to any challenge under the Equal Protection Clause). To survive "scrutiny," the infringing entity must demonstrate "important governmental objectives," and a

discriminatory scheme substantially "related to achievement of those objectives." 430 U.S. at 316.

In this case, it is inconceivable that the Second Circuit can demonstrate a "governmental objective" in depriving basic "notice" requirements to an identifyiable class of litigants. In *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), it was held that vague government rules "impermissibly delegate basic policy matters to . . . judges . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." This "application" similarly occurs over "vague" rules in the Second Circuit. And under strict scrutiny of the Equal Protection Clause, the Second Circuit's systematic denial of "notice" would undoubtedly constitute an "invidious" and "unjustified" discrimination against a class of citizens. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

IV. REASONS FOR GRANTING THE WRIT

1. "REMEDY" FOR A DUE PROCESS VIOLATION IS TO "SET ASIDE" THE OFFENDING JUDGMENT

If due process is to be in any way *meaningful*, then remedies must be available to injured parties. This issue obviously takes on unique constitutional dimensions when the government inflicts injuries and deprives parties of constitutional rights.

In *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Supreme Court unanimously held that the only "remedy" for a due process violation is to grant the "motion to set aside the decree and consider the case anew." *Id* at 552.

In *Armstrong*, the petitioner received no "notice of any kind" for the pendency of a child-custody "proceeding." 380 U.S. at 547-548. Without any notice of the hearing, the petitioner lost custody

of his daughter. In subsequently learning of the decree, he immediately appealed to his state's appellate courts, but to no avail.

On petition for *certiorari*, the Supreme Court reversed the Texas Supreme Court and held as follows:

> . . . . there is no occasion to linger long. It is clear that a failure to give the petitioner notice of the pending [] proceedings violated the most rudimentary demands of the due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 313 (1950)." [380 U.S. at 550].

The facts set forth in *Dittes* are just as egregious as those in *Armstrong*. Petitioner received no "notice of any kind," 380 U.S. at 547-548, he was

faced with double-notice violation[18], and thereafter made multiple constitutional challenges over the defective notice procedures of the court's local rules. These subsequent burdens continued for almost seven years. In *Armstrong*, the Court addressed the "burdens" created by trial court's failure to provide "due process of law." Opining for the unanimous Court, Justice Stewart declared that:

> Had the petitioner been given timely notice which the Constitution requires, [the] moving part[y] would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. . . . Instead the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. . . . [T]hese burdens would not have been imposed upon him had he

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[18] Petitioner's double-notice violation consisted of a lack of "notice" requirements in the Second Circuit Local Rules, and the deputy clerk's failure to provide "notice" of an administrative deficiency under LR 6(c).

> been given timely notice in accord with the Constitution. [380 U.S. at 551].

According to *Armstrong*, the remedy for a due process violation is to set aside the "offending judgment," *Id.* at 552. Anything less will undermine the protections afforded by the Due Process Clause:

> Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. . . . . [380 U.S. at 552].

In *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80 (1988), in considering another default judgment "entered without notice," this Court again unanimously reiterated the constitutional maxim:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process . . . . [O]nly "wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place." The Due Process Clause demands no less in this case."

485 U.S. 80, 86-87 (1988)(quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

Where the mandate in *Dittes* was also "entered without notice," that judgment too must "be set aside" and the "slate "wipe[d] clean," *Armstrong*, 380 U.S. at 552. "The Due Process Clause demands no less." *Peralta,* 485 U.S. at 86-87; *Gray v. Netherland*, 518 U.S. 152 (1996) ("A pro forma opportunity will not do."); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (judgment "set aside" where "no mention was made of a procedure for the disposition of certain claims").

2. EXTRAORDINARY WRIT IS WARRANTED TO CORRECT DUE PROCESS DEFECTS IN SECOND CIRCUIT

Rule 20.1 of the Supreme Court Rules governs the procedure for issuing an extraordinary writ. "To justify the granting of any such writ, the petition

must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

This petition satisfies the requirements for an extraordinary writ under Rule 20.1:

1. For the Court to consider an extraordinary writ, it must be in "aid of the Court's appellate jurisdiction." Here, jurisdiction, is firmly established under Article III of the U.S. Constitution. "The judicial power of the United States, shall be vested in one Supreme Court," with supervisory authority over "such inferior courts as the Congress may from time to time ordain and establish." Art. III, U.S. Const. Congress also enacted the Rules Enabling Act (28 U.S.C. § 2071), which gives the Supreme Court "jurisdiction" over the local rules,

practices and processes of both district and circuit courts.

2. The above case also establishes three elements to support an "exceptional circumstance." First, the Local Rules of the Second Circuit are not in compliance with the Due Process Clause of the Fifth Amendment. Second, the facts in *Dittes* set forth an ongoing governmental deprivation of "notice" to an entire class of appellants in the Second Circuit. Third, the court revised the Local Rules in January 2010, but failed to cure the defective "notice" requirements for the adjudication of pro se-to-counseled appeals. Taken as a whole, these three collective factors arguably raise an "exceptional circumstance" that would warrant the exercise of an extraordinary writ to "aid the Court's appellate jurisdiction."

3. Finally, short of passing legislation in Congress, adequate relief cannot "be obtained in any other form or from any other court." While the House of Representatives and U.S. Senate could introduce legislation to compel the Second Circuit to furnish constitutionally sufficient "notice" requirements for *all litigants,* this drastic legislation would only underscore a short fall of the Supreme Court's supervisory power as enumerated under 28 U.S.C. § 2071: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the . . . courts of appeals."

A. Mandamus Is Warranted Under 28 U.S.C. § 1651

Congress promulgated 28 U.S.C. § 1651(a) (the "All Writs Statute") to aid the Court's "appellate

jurisdiction."[19] Historically, this writ has been used to direct lower courts to comply with lawful statutes, or in those instances where lower courts have either "abused discretion" or engaged in a "judicial usurpation of power." *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 217 (1945) ("[W]hen a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use [of this writ]."); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943) (the writ is "in aid of appellate jurisdiction . . . to confine an inferior court to a lawful exercise of its prescribed jurisdiction . . . when it is its duty to do so.").

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[19] 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This petition respectfully warrants consideration of mandamus. For over three decades, the Second Circuit has failed to furnish "notice" requirements in pro se-to-counseled appeals. From 2003 to the present, the Second Circuit has failed and/or declined to investigate "notice" defects in the Local Rules on six separate occasions. Further, the Second Circuit has enjoined the Petitioner from challenging his due process rights in the Local Rules. Finally, the Revised Local Rules (2010) indicates the Second Circuit intends to continue notice deprivation for this category of appellants into the foreseeable future.

As noted above, the Second Circuit's "arbitrary exercise of the powers of government" fails to "satisfy the minimum standards of due process." *Green v. Lindsey*, 456 U.S. 444, 453-454 (1982). It is precisely this institutional pattern of avoiding a constitutional

review of the Local Rules which arguably demonstrates an "abuse of discretion"[20], or a 'judicial usurpation of power," or both.[21]

Where the Fifth Amendment guarantees due process rights to citizens--no court of law may "constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safe-guards." *Vitek v. Jones*, 445 U.S. 480, 490-491 (1980); *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

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[20] Abuse of discretion is a judicial standard "asserted to be grossly unsound, unreasonable, or illegal." Black's Law Dictionary (West Group, 7th Ed., 1999) pg.11.

[21] While it is true that 28 U.S.C. §2071 affords circuit courts a degree of latitude in framing local rules, under no circumstances may a court fail to provide "notice" requirements, such that there is a failure to state "where" and at "what time" a party is to proceed, or provide the "legal consequences [that] may ensue" for a failure to act. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

3. FOUR ISSUES MUST BE REVIEWED IN THE SECOND CIRCUIT LOCAL RULES

Dittes presents a proper vehicle to review the "notice" issues in the Local Rules of the Second Circuit. Granting certiorari would permit the Supreme Court to exercise its statutory and "inherent supervisory power" to ensure these court's local rules "are consistent with 'the principles of right and justice.'" *Frazier v. Heebe*, 482 U.S. 641, 642 (1987); *In Re Ruffalo*, 390 U.S. at 554.

Specifically, four local rules and practices require review. They are as follows:

1. The Second Circuit does not furnish "notice" requirements for pro se-to-counseled appellants. For seven years (2003-to the present), the Second Circuit has been "on notice" that its Local Rules contain constitutionally insufficient "notice" for pro se-to-counseled appellants.

   Does the Due Process Clause have sufficient reach to require the Second Circuit to furnish

"notice" requirements for pro se-to-counseled appeals?

2. The Second Circuit utilizes Forms C and D, as well as *pro forma* dismissal mandates, for the administrative dismissal of pro se-to-counseled appeals. There are no published "notice" requirements as to "how" or "where" Forms C and D apply in the adjudication of these appeals.

   Should the Due Process Clause of the Fifth Amendment weigh-in on this local practice? If so, should Forms C and D be amended or revised to include "notice" requirements as to their applicability in all types of adjudication?[22]

3. The Second Circuit authorizes deputy clerks to "dismiss" appeals on behalf of the Clerk of the Court over alleged administrative violations. *See* deputy clerk dismissal of *Dittes*, App E infra.

   Should there be some protections under the Due Process Clause to ensure the Clerk of

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[22] *See* Revised Form C, App, N, *infra* at 1. Proposed change could state Form C must be submitted within 14 days of the Notice of Appeal, *or within 14 days of counsel's "notice of appearance" in pro se appeals.*

Court has properly and lawfully authorized a junior clerk to "dismiss" or "determine" appeal?[23]

Likewise, if a deputy clerk dismisses an appeal without the signature of the Clerk of the Court[24], should this dismissal order be accorded the same weight and authority of a dismissal by the Clerk or a three-judge panel?

4. Finally, the Second Circuit authorizes single circuit judges to be the final voice in "determin[ing]" or "dismiss[ing]" appeals.[25] In

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[23] Second Circuit Local Rule 27.1 permits the Clerk of the Court to "decide routine, unopposed procedural motions." LR 27.1. This rule does *not permit a deputy clerk* to "decide" or determine these motions.

The likelihood of error in allowing a deputy clerk to dismiss an appeal is enormous. In *Dittes*, the deputy clerk used the wrong dismissal form, then failed to follow due process protections provided under Local Rule 6 (c). This is precisely the kind of action wherein fairness is rarely obtained in a"one-sided determination of facts decisive of rights." *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172 (1951). "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

[24] A signature signifies to appellant and public alike that the facts in the dismissal have been reviewed and *approved* by the Clerk of the Court.

[25] Judge Raggi twice "determine[d]" or "dismiss[ed]" the appeal of *Dittes*. The Advisory Committee Notes states that only "[s]ome types of motions may be ruled on by a single judge." USCS Fed Rules App Proc R 27 Such motions are only for *intermediate relief*. Most circuit courts specifically

Dittes, a single judge twice "dismiss[ed]" or "determin[ed]" this appeal (December 8, 2003 and December 19, 2008).

Where a single circuit judge has "dismiss[ed]" or determine[d]" an appeal—is that single-judge order (a) in compliance with the three-judge rule set forth 28 USC 46(c) [26] and FRAP 27(c)? (b) should a single-judge order invoke the law-of-the-case doctrine? [27] and (c) should that order be binding on subsequent panel reviews?[28]

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enumerate the motions which may be considered by a single judge. As evidenced in *Dittes*, the Second Circuit is far more permissive in the motions that a single judge may review and determine.

[26] 28 USC § 46(c) provides in pertinent part that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges."

[27] A single-judge-order established the "law-of-the-case" in *Dittes*. Judge Raggi's order (finding no due process violation) bound all subsequent merits panel reviews so much so that *res judicata* permeated all subsequent rulings. See *Friends of Earth v. Reilly*, 966 F.2d 690, 696 n. 7, 296 U.S. App. D.C. 170 (D.C. Cir. 1992) (expressing doubt that a "single judge acting on a motion . . . can bind a full panel" and invoke the "law-of-the-case" doctrine).

[28] The local practice allowing a single-judge to "dismiss" or "determine" appeals substantially deviates from the other circuit courts. *See Locke v. Allstate Ins. Co.*, 696 F.2d 1340 (11th Cir. 1983)(holding that a single-judge order, not appealed to a three-judge panel under FRAP 27(c), "was nonbinding").

4. LOCAL RULES VIOLATE FRAP 47

Congress enacted FRAP 47(a) to ensure that the local rules of district and circuit courts furnish "*fair rules*" and "*notice*" to all litigants. Moore's Federal Practice 3d, Local Rules by Courts of Appeals, § 347.6-10 (1997). Concerned that "notice" may be insufficient in the local rules of some courts, in 1995, Congress *expanded* the limitations on the rule-making authority of district and circuit courts. To this end, Congress promulgated FRAP 47 (b) which requires in pertinent part that:

> "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in . . . the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." [FRAP 47 (b)].

Despite this prohibition against arbitrary enforcement of local rules without "actual notice," the Second Circuit has acted with impunity by imposing

"sanctions" and "other disadvantage[s]" over fuzzy and inconsistent applications of Forms C and D. This arbitrary application of local rules and forms, without "actual notice," has caused "part[ies] to lose rights."

FRAP 47(b) is not an *option*. The Federal Rules of Appellate Procedure is a statutory mandate that requires circuit courts to uphold all rules under FRAP, not just some of them. Congress also promulgated 28 U.S.C. § 2071 to ensure the local rules of these courts do not abridge or modify any substantive rights, and that these local rules remain "consistent with Acts of Congress." 28 U.S.C. § 2072.

In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) the Supreme Court underscored that "constitutional limitations upon the power of courts, even in aid of their own valid processes," do not permit them "to dismiss an action without affording

a party the opportunity for a hearing on the merits of his cause."). The Court further held that where there are any instances of deprivation, a court's rules "must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law." *Id.* at 209 (citing *Hovey v. Elliott,* 167 U.S. 409 (1897) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908)).

The holdings in *Dittes* unequivocally violate the "notice" protections in FRAP 47 (a)(b). This Court should grant certiorari to re-emphasize the fundamental importance that local rules must be consistent with the statutes of Congress, and that they should be "devised to promote the ends of justice, not defeat them." *Hormel v. Helvering*, 312 U.S. 552 (1941); *Stickney v. Wilt*, 90 U.S. 150, 162 (1874).

5. DITTES IS INCONSISTENT WITH FEDERAL LAW

For decades the Supreme Court has emphasized that the harsh sanctions of a default should only lie to penalize a party's "willful," "deliberate" or "contumacious conduct." *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (*per curiam*). Nowhere in *Dittes* is there a scintilla of evidence to support "deliberate" or "contumacious conduct" to support the draconian sanction of a default.

Three years ago, in *Woodford v. Ngo*, the Supreme Court *re-emphasized* that "courts should not impose the draconian punishment of procedural default" where litigants "make reasonable, good-faith efforts to comply," but by "simple inadvertence, make some procedural misstep along the way." 548 U.S. 81, 119 (2006). Here, Petitioner and his counsel

made every effort to follow the court's procedural requirements--but the underlying "procedural misstep," allegedly done by the Petitioner or his counsel, *is not even to be found in the Local Rules.*

The lack of "notice" in the Second Circuit Local Rules does not, *and cannot*, justify the "draconian" sanction of of a default. *Id.* As the Supreme Court makes clear, any court decision to enter a default must be the "last resort," and it may only be ordered if "non-compliance" is due to "willful" and "bad faith disregard." *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958).

This case does not even come close to the requirements for a "draconian" default. 548 U.S. at 119. The simple fact remains that the Second Circuit cannot identify *any published rule* that the Petitioner "disregard[ed]" or failed to satisfy. *Id.*

(A) *Dittes* is Inconsistent with Second Circuit Case Law

There is certain irony in the Second Circuit's inability to base a default on alleged "willfulness in *Dittes*." Three decades of case law reveals the extent of the "unjust," "erroneous" and "inconsistent" applications over Forms C and D.

In *Fox. v. Amtrak,* 241 Fed. Appx. 771, 772 (2d Cir. 2007), the appeal was dismissed for failure to file Forms C and D, but appellant proceeded pro se, and the court "granted Fox's motion to reinstate his appeal." In *LeBoeuf, Lamb, Greene & MacRae v. Worsham Group, Inc.,* 185 F.3d 61, 63 (2d Cir. 1999), the appeal was dismissed for failure to file Forms C and D, but on subsequent appeal, the court heard the dispute and "reversed" judgment. In *Gilroy v. Erie Lackawanna R.R. Co.*, 421 F.2d 1321, 1323 (2d Cir. 1970), an attorney failed to file Forms C and D for

twenty months, but court *declined* to dismiss the appeal, and instead affirmed "sanctions" and "costs."

Equally, a review of Second Circuit case law regarding the recall of mandates over Forms C and D shows inconsistencies, when compared to *Dittes*. *See, for example*, *Calloway v. Marvel Entertainment Group,* 854 F.2d 1452, 1473 (2d Cir. 1988) (pro se appeal dismissed for "failure to prosecute," but on a motion for reconsideration, court "recall[ed] the mandate and reinstat[ed]" the appeal); *United States v. All Assets of Statewide Auto Parts,* 971 F.2d 896, 900 (2d Cir. 1992) ("appeal was dismissed. . . for failure to comply with the require-ments" of Forms C and D, but on motion to recall, mandate was "vacated and case restored to the calendar"); *Metzen v. United States*, 19 F.3d 795 (2d Cir. 1994) ("appeal was dismissed for failure to comply" with Forms C and D, but mandate was recalled and appeal "reinstated" by

a subsequent "scheduling order" from clerk's office); *Gaines v. Kelly*, 202 F.3d 598, 601 (2d Cir. 2000) ("appeal was dismissed for failure" to comply with CAMP, but two years later, court granted pro se appellant's "motion to recall mandate").

To summarize, the default in *Dittes* is not only inconsistent with federal and Second Circuit case law, it is outright unconstitutional. *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962) (judgment reversed as "void" where the court failed to give "adequate notice" of judicial proceedings); *Riverside and Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 195 (1915) (same).

5. RES JUDICATA SHOULD NOT EXTINGUISH DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT

The Second Circuit has blazed a new trail in American Jurisprudence with its proposition that *res judicata* can be used to *extinguish* due process challenges under the Fifth Amendment. The novelty of this proposition is completely inapposite to centuries of well-settled law in this land. A final judgment must "satisfy the applicable requirements of the Due Process Clause," otherwise no court "may grant preclusive effect to a constitutionally infirm judgment." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481 (1982); *Baldwin v. American Surety Co.*, 287 U.S. 156 (1932) ("entry of the judgment without notice . . . violate[s] the due process clause").

In *Dittes*, the evidence strongly suggests that the Second Circuit deliberately overlooked important

judicial obligations to determine "applicable requirements of the Due Process Clause." 456 U.S. at 481. On no less than six separate occasions, the Second Circuit has declined or refused to investigate the "constitutionally infirm judgment" in *Dittes*. While it is understandable there is a "presumption of regularity which attaches to final judgments," *Parke v. Raley*, 506 U.S. 20, 21 (1992), it is inexcusable and a public outrage for the Second Circuit to fail or obstruct an investigation into due process concerns over the Local Rules. Surely this must be an "unprecedented departure from accepted principles of res judicata." *Fed Dept. Stores, v. Moitie*, 452 U.S. 394, 399 (1981).

If this Court allows *Dittes* to stand, it will foster precisely the arbitrary governmental action that the Founders intended to *prevent* with the Due Process Clause. Under the Constitution, no citizen

shall be bound by a "final judgment" that is inconsistent with the "due process of law," and any such action enforcing this judgment "is not that due process which the Fifth Amendment . . . requires." *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, (1918); *Old Wayne Mutual Life Assn. v. McDonough,* 204 U.S. 8 (1907).

6 SECOND CIRCUIT'S LOCAL RULES CREATE INCONSISTENT APPLICATION OF DUE PROCESS AMONG CIRCUIT COURTS

Eleven U.S. Courts of Appeals base their local practice and procedures on *post-docketing forms* for the adjudication of their appeals. *See* App A *infra* at 1-3. The First, Fourth, Sixth, Seventh, Eleventh and DC Court of Appeals have pre-argument statements (similar to Form C in the Second Circuit), but these forms are *not* required until *after* the appeal is docketed in the circuit court. Likewise,

eleven circuit courts require transcript forms (similar to Form D), but these, too, are not required until *after* the appeal is docketed. All of the administrative forms and mechanisms for the adjudication in these circuit courts revolve around the date the appeal is *docketed* in that court.

The Second Circuit is fundamentally different because its administrative requirements essentially revolve around *pre-docketing forms,* and the date of the Notice of Appeal in the district court below. Although this reliance on pre-docketing forms is not necessarily incorrect (as long as proper "notice" is provided), it becomes problematic when, as here, the Second Circuit demonstrates an inflexible and rigid application and enforcement of local forms. Moreover, it becomes constitutional where there are no published "notice" requirements as to how these

pre-docketing forms apply in a *post-docketing activity,* such as a pro se-to-counseled appeal.

The Second Circuit's intransigence over its Local Rules has created a serious ripple in the consistency of the "due process of law" among the circuit courts. If this public issue is not addressed, then the Second Circuit's Local Rules, complete with insufficient "notice" requirements and discriminatory applications, will acquire the "imprimatur of the Supreme Court's rule-making authority." *Ticor Title Ins. Co. v. Brown*, 114 S.Ct. 1359 (1994); *Hudson v. Parker*, 156 U.S. 277, 281 (1895) (Supreme Court is ultimately responsible for rule-making authority in all "inferior courts").

V. SUMMARY

This petition illustrates the grave dangers when a circuit court's overbearing application of local rules diminish the substantive rights guaranteed by the Constitution. The U.S. Circuit Courts of Appeals have been entrusted with the high calling to balance the needs for procedural efficiency, while upholding due process protections. In *Stanley v. Illinois,* 405 U.S. 645, 656 (1972), the Supreme Court elaborated on this important balancing act:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . ." [*see also United States Dep't of Agriculture v. Murry*, 413 U.S. 508, 514-515 (1973)].

The Second Circuit's actions in *Dittes* typify an "overbearing concern for efficiency and efficacy." *Id.* These actions caused "part[ies] to lose rights," without "actual notice of requirement[s]." FRAP 47(b). It is unfortunate that the Second Circuit's zeal in enforcing its local rules is at the expense of the higher values embraced by the Constitution. *Id.* at 656.

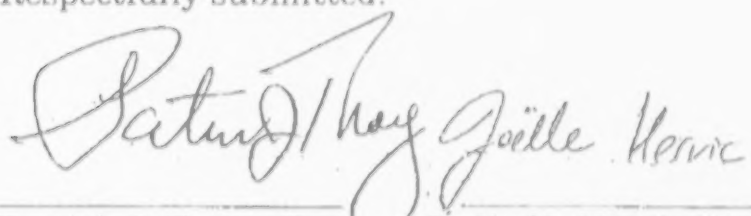
The Supreme Court must grant certiorari to review the insufficient "notice" requirements, and inconsistent pre-docketing forms, in the Second Circuit Local Rules. The Second Circuit Local Rules, like the Supreme Court Rules, must be "consistent with Acts of Congress," and uphold all aspects of the Due Process Clause, which "comport[s] with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom,* 339 U.S. 9, 16, 70 S.Ct. 457 (1950). In sum, where fundamental notions of the

Due Process Clause are at stake, both in the Second Circuit and the consistency throughout the circuits, then "this essential constitutional promise may not be eroded." *Hamdi v. Rumsfield*, 542 U.S. 507, 533 (2004).

VI. CONCLUSION

WHEREFORE, for all of the foregoing reasons, so that that the Due Process Clause of the Fifth Amendment may not be eroded, this Petition should be granted.

Respectfully submitted.



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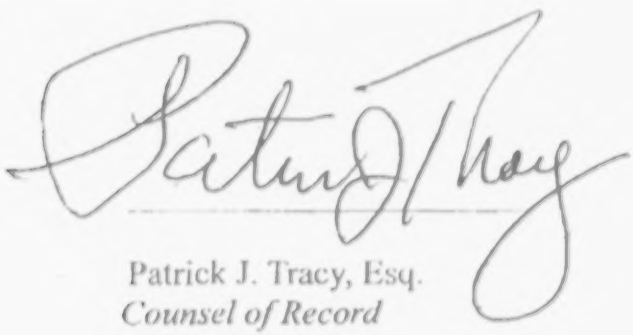
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33(1)(h) of the Supreme Court Rules, it is hereby certified that the word count of this petition is 8,881. The word count was acquired on Microsoft Office Word 2007, to include footnotes. The word count excludes the text of constitutional provisions, statutes, and regulations, which is 351 words, as permitted under Rule 14 (1)(f) and Rule 33(1)(d).



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PETITIONER'S

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, U.S. Const., Section 1, paragraph 1

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, U.S. Const., Section 2, paragraph 2

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction.

Amendment V. U.S. Const. (Due Process Clause)

> "No person shall . . . be deprived of life, liberty, or property, without due process of law"

28 USC § 46(c)

> *Cf.* 28 USC § 46(c): "Cases and controversies shall be heard and determined by a court or panel of not more than three judges."

28 U.S.C. § 1651(a):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 USC § 2071

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have effect on

(c) pending proceedings as the prescribing court may order.

(d) (1) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

28 USC § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the . . . courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

FRAP 27 (c) (Power of a Single Judge To Entertain A Motion)

A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

FRAP 47 (a) "Local Rules"

:

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

FRAP 47 (b) ("Procedure When There Is No Controlling Law"):

> A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

UNITED STATES COURT OF APPEALS
For the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moyhihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of December, two thousand eight,

Present: FILED: DEC. 19, 2008

Hon. Reena Raggi,
Circuit Judge,

Jeffrey L. Tibbetts,
Plaintiff-Appellant,
v. 01-7377-cv
James Ditties, et al.,
Defendants-Appellees

Jeffrey P. L. Tibbetts,
Plaintiff-Appellant,
v. 01-0694-cv
Dwayne E. Huebner, et al.,
Defendants-Appellees

Jeffrey P. L. Tibbetts,
Plaintiff-Appellant,
v. 01-4695-cv
James Ditties, et al.,
Defendants-Appellees

Jeffrey P. L. Tibbetts,
Plaintiff-Appellant,

v. 01-5780-cv

President & Fellows of Yale College, et al.,
Defendants-Appellees

John Rowland, et al.,
Defendants

Upon review of the dockets in the above-captioned appeals, and following the resolution of plaintiff-appellant Tibbetts's appeal in 05-5780-cv, it is hereby ORDERED as follows:

In Tibbetts v. Ditties, 01-7377, Tibbetts's July 24, 2001 "motion to clarify the Court's Order," and November 30, 2001 "motion to allow notice of default," and defendants-appellants' motions of June 13, 2003, and November 6, 2003, to dismiss the appeal, are DENIED as moot in light of the court's orders of September 16, 2003 and December 8, 2003, dismissing the appeal and denying Tibbetts's motion to reinstate. In addition, upon review and full consideration of the claims presented therein, Tibbetts's motion to recall the mandate, "motion for 'Notice' requirements in pro-se-to counseled appeals, and to be relieved of the unpublished requirements in pro-se to counseled appeals," and "motion to file an oversized memorandum of law," each docketed in 01-

7377 on July 7, 2008, are DENIED. This action does not represent "exceptional circumstances" justifying the exercise of this court's power to recall a mandate, see, Sergeant v. Columbia Forest Products, Inc., 75 F.3d 86, 89 (2d Cir. 1996), as we find no merit in the due process claims asserted in the motions.

For the same reason, Tibbetts's motions to recall the mandate in Tibbetts v. Ditties, 05-0694, and Tibbetts v. Ditties, 05-4695, docketed in those actions on July 7, 2008, are DENIED.

Tibbetts's motion for the assignment of *pro bono* counsel in Tibbetts v. President & Fellows of Yale College, 05-5780, filed on September 6, 2007, is DENIED as moot in light of the notice of appearance filed in that action by Andrew J. Schatkin on October 1, 2007.

Finally, in the recent order disposing of the appeal in Tibbetts v. President & Fellows of Yale College, 05-5780, the court imposed certain conditions on Tibbetts's future filings in this court. We adopt those conditions as part of this order and advise Tibbetts that non-compliance can result in sanctions.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: Franklin Perry

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEFFREY P.L. TIBBETTS, M.DIV	:
	: CASE NO.
Vs.	:3:95CV00995
	:(AVC)
JAMES DITTES and DWAYNE HUEBNER in their personal capacities: of THE YALE DIVINITY SCHOOL, and THE YALE CORPORATION and and ADMINISTRATORS AND FACULTY OF YALE DIVINITY SCHOOL, in their official capacities: DEAN THOMAS OGLETREE, ADMISSIONS DIRECTOR JAMES GARRETT, FORMER PROFESSIONAL STUDIES COMMITTEE CHAIRMAN HARRY ADAMS, DIRECTOR PENE-LOPE LAURENS, and YDS REGI-STRAR DETRA MACDOUGALL	:

JUDGMENT

This action having commenced by a complaint and having been assigned to the Honorable Alfred V. Covello, Chief United States District Judge; and

The Court having issued a Ruling and Order

on May 17, 1996, that defendants Dwayne Huebner and Harry Adams had not been served with process; and

The matter having then been tried before a jury on the plaintiff's claims against defendants James Dittes, Thomas Ogletree, Penelope Laurens, Detra MacDougall and Yale University; and on January 19, 200, the jury having returned a verdict in favor of the defendants; and further

The Court having issued an Order on March 28, 2000, dismissing the action as to defendant James H. Garrett; it is therefore

ORDERED, ADJUDGED and DECREED that the complaint is dismissed as to defendants Huebner, Adams and Garrett; and it is further

ORDERED, ADJUDGED and DECREED the judgment be and is hereby entered for defendants Dittes, Ogletree, Laurens, MacDougall and Yale University.

Dated at Hartford, Connecticut this 29th day of March, 2000

KEVIN F. ROWE, CLERK

BY: Mary A. Wiggins

Deputy Clerk

U.S. COURTS OF APPEALS: ANALYSIS OF PRE-DOCKETING REQUIREMENTS

U.S. Circuit Court	Predocketing Forms Other Than NOA?	Counsel File Predocketing Forms?	Pro Se File Predocketing Forms?	Requirements to transfer pro se-to-counseled appeal?	Dismissal by Deputy Clerk?
FIRST CIR. (www.ca1.uscourts.gov) (617-748-9057)	No: Transcript and Docketing Statement due *after* appeal is docketed	No: (Forms due 14 days *after* appeal is docketed)	No: Transcript is optional *after* appeal is docketed	"Notice of appearance" (due 14 days *after* initial appearance)	No: ("Multiple warnings" Only dismissed by Clerk after certified attempts at notice)
SECOND CIR. (www.ca2.uscourts.gov) (212-857-8500)	Yes: Form C docketing and Form D (transcript)	Yes: Forms C and D must be filed with 14 days of NOA	Yes: Form C and D "waived" prior to 2/2010. (Revised 2010: Form C required. Forms C and D 14 days from NOA)	Notice of appearance (unpublished requirement) Forms C and D filed retroactively to NOA	Yes
THIRD CIR. (www.ca3.uscourts.gov) (215-597-2995)	No: Transcript certification due 14 days after letter of appeal docketing	No: (Transcript due 14 days *after* appeal is docketed; Mediation statement optional)	No: Only NOA and filing fee; transcript is optional after appeal is docketed	"Notice of Appearance" (14 days after appearance)	No: (Follow-up letters of notice sent; only "motion panel may grant a motion to dismiss an appeal" IOP 10.3.5.)
FOURTH CIR. (www.ca4.uscourts.gov) (804-916-2700)	No: Transcript and docketing statement due *after* appeal is docketed	No: (Statement of Issues and Transcript Form due 14 days *after* appeal is docketed and numbered).	No: NOA and Filing Fee; statement of issues is optional	"Notice of Appearance"; (Transcript Form is optional)	No: (Notice for compliance sent first, Clerk will consider dismissal if failure to cure deficiency).

BEST AVAILABLE COPY

U.S. Circuit Court	Predocketing Forms Other Than NOA?	Counsel File Predocketing Forms?	Pro Se File Predocketing Forms?	Requirements to transfer pro se-to-counseled appeal?	Dismissal by Deputy Clerk?
FIFTH CIR. (www.ca5.uscourts.gov) (504-310-7700)	No: (Transcript Form due *after* appeal is docketed)	No: (Transcript is due 15 days *after* appeal is docketed)	No: (Filing Fee and NOA)	"Notice of Appearance Form" (15 days after appearance)	No: (Merit panel review; reinstatement authorized where deficiency is cured)
SIXTH CIR. (www.ca6.uscourts.gov) (513-564-7000)	No : (Statement and Transcript due *after* appeal is docketed)	No: (Statement and Transcript due 14 days *after* docketing)	No: (Fillable Pro se Forms on website after appeal is docketed)	"Notice of appearance" (14 days after notice given; statement of issues is optional)	No: (Notice required before any appeal can be dismissed; only Clerk of Court can dismiss for failure to prosecute)
SEVENTH CIR. (www.ca7.uscourts.gov) (312-435-5850)	No: (Transcript Info Sheet and Docketing Statement due 7 days after NOA)	No: (Docketing Statement and Transcript Info Sheet, due 7 days after NOA)	No: (Transcript Info Sheet and Docketing Statement due 7 days after NOA)	"Notice of appearance" (7 days after appearance)	No: (Clerk may only dismiss routine or ministerial appeals; all substantive motions referred to merits panels)
EIGHTH CIR. (www.ca8.uscourts.gov) (314-244-2400)	No: (Form A or B due 3 days after appeal is docketed, transcript form due 14 days *after* appeal is docketed)	No: (Form A or B due 3 days after appeal is docketed; transcript cert 14 days *after* appeal is docketed)	No: (Information sheet and transcript sent to pro se appellant *after* appeal is filed)	Notice of appearance (additional documents depends on scheduling order)	No: (Show cause order is issued as to why case should not be dismissed; only Clerk of Court may dismiss appeal for failure to prosecute)
NINTH CIR. (www.ca9.uscourts.gov) (415-355-8000)	No: (Transcript Cert. due 10 days *after* appeal is docketed; Issue Statement for Mediation)	No: (Transcript Form due 10 days *after* appeal is docketed)	No: (Transcript is optional after appeal is docketed)	"Notice of Appearance" (due 10 days *after* appearance)	No: (Clerk may only dismiss routine, procedural, or uncontested appeals)

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U.S. Circuit Court	Predocketing Forms Other Than NOA?	Counsel File Predocketing Forms?	Pro Se File Predocketing Forms?	Requirements to transfer pro se-to-counseled appeal?	Dismissal by Deputy Clerk?
TENTH CIR. **(www.ca10.uscourts.gov)** **(303-335-2729)**	No: (Transcript Form due *after* appeal is docketed)	No: (Transcript 10 days *after* appeal docketed)	No: Transcript (optional)	"Entry of Appearance" (transcript optional after appearance)	No: (Clerk may only dismiss routine, procedural, or uncontested appeals)
ELEVENTH CIR. **(www.ca11.uscourts.gov)** **(404-335-6100)**	No: (Civil Appeals Statement and Transcript 14 days *after* appeal is docketed)	No: (Civil Appeals Statement and Transcript 14 days *after* appeal filed)	No: (Transcript optional)	"Notice of appearance" (Transcript is optional)	No: (Notice required before any appeal can be dismissed, only Clerk of Court can dismiss for failure to prosecute)
DC COURT OF APPEALS **(cadc.uscourts.gov)** **(202-216-7000)**	No: (Statement and Transcript not part of docketing process)	No: (Statement/ Transcript not part of docketing process)	No: (Statement/ Transcript not part of docketing process)	"Notice of appearance"	No: (Clerk may only dismiss routine, procedural, or uncontested appeals)

HOW TO APPEAL YOUR CIVIL CASE

FILING YOUR NOTICE OF APPEAL.

Appeal From a District Court. The Notice of Appeal must be filed in the district court within 30 days from the entry of the order or judgment of the district court which you are appealing. If the U.S. government is a party, the Notice of Appeal must be filed within 60 days of entry of the order or judgment you are appealing. If a timely Notice of Appeal has been filed by one party in a case, any other party may file a Notice of Appeal within 14 days after the first Notice of Appeal is filed, or within the time previously stated, whichever is later.

Appeal From the Tax Court or Petition for Review of an Order of a U.S. Government Agency. If you are appealing a decision of the U.S. Tax Court or seeking review of, or to enforce an order of, a U.S. agency, follow the applicable statute governing the time for filing the Notice of Appeal or Petition for Review.

NOTE THAT ALL PERSONS AND ENTITIES THAT WISH TO BE APPELLANTS SHOULD BE NAMED IN THE NOTICE OF APPEAL.

PAYING YOUR DOCKET FEE.

Appeal From a District Court. Pay the $250 docket fee, plus $5.00 processing fee, to the Clerk of the district court when you file the Notice of Appeal.

Appeal From the Tax Court or Petition for Review of an Order of a U.S. Government Agency. Pay the $100 docket fee in the U.S. Tax Court, if you are appealing from an order of that court. If you are seeking review of an order of any other U.S. agency, the docket fee of $100 is paid in the Court of Appeals.

If you do not pay the fee within ten days of filing the Notice of Appeal, your case may be dismissed by the Court of Appeals. If the appellant cannot afford to pay the fee, you must file a motion for "*in forma pauperis*" status (as a poor person) in the district court (or in this Court in an agency appeal). If this is denied, the motion may be filed in the Court of Appeals. The motion to this Court must be on the Court's motion form (see **Motions**, below), and have a proper financial affidavit attached. *If you intend to move for in forma pauperis status, you must do so within ten days of filing the Notice of Appeal or within ten days notify the Court that you will make a motion for in forma pauperis status within 30 days of filing the Notice of Appeal.*

THESE INSTRUCTIONS ARE ONLY A SUMMARY OF THE COURT OF APPEALS PROCEDURES. PLEASE REFER TO THE FEDERAL RULES OF APPELLATE PROCEDURE, AS SUPPLEMENTED BY THE LOCAL RULES OF THIS COURT, FOR ANSWERS TO SPECIFIC QUESTIONS.

APP. B1

ADMISSION TO PRACTICE BEFORE THE SECOND CIRCUIT

Counsel of record and counsel who will argue the appeal must be admitted to the bar of this Court. For forms and information on admission to practice before this Court, contact the Court's Admissions Clerk at (212) 857-8603.

FILING PRE-ARGUMENT FORMS (Forms C or C-A, and D).

Form C or C-A. Within 10 days after filing your Notice of Appeal, or your Petition for Review or Application for Enforcement, file an original and one copy of Form C (for an appeal from the district court or the Tax Court) or Form C-A (for an appeal from an agency) with the Clerk of the Court of Appeals and serve it on your adversary. The form cannot be mailed to the Court on the 10th day. It must be received in the Court of Appeals by the 10th day (See F.R.A.P. 26(a)). It is strongly recommended that you serve and file Form C or C-A at the same time you file your Notice of Appeal. These instructions also apply to cross-appeals.

The requirement for filing the pre-argument statements (forms C or C-A and D) is waived in pro se cases. For the purpose of Court of Appeals procedures, pro se's are those parties who are proceeding without benefit of an attorney. An attorney or law school graduate (including a disbarred or suspended attorney) who is proceeding on his or her own behalf is not considered pro se for these purposes and must fully comply with the rules.

Every question on Forms C and C-A should be answered, particularly where a narrative is requested. The name(s) of the appellant(s) and the complete name, address, and phone number of attorneys for each party must be provided. You should append to Form C as many additional pages as are necessary to fully complete the information requested.

Form D. (Appeals from the district court only.) Within 10 days after filing your Notice of Appeal in the district court, file one copy of Form D (transcript information) with the Clerk of the Court of Appeals, furnish two copies to the court reporter, and send one copy to counsel for the appellee(s).

Arrange for the transcription of the stenographic record of the trial at the earliest possible moment, and clearly indicate on Form D what portions of the trial record are being ordered. In the rare circumstances in which transcripts are not being ordered or are not required, ***counsel must nonetheless file Form D and note thereon the status of transcripts and reasons, if any, for not ordering transcripts.***

PROVIDING COPIES OF JUDGMENTS, ORDERS, AND/OR DECISIONS

At the time you file Form C or C-A, you must provide the Court of Appeals with:

- A copy of each judgment, order, and/or decision of the district court, or agency from which you seek review.

APP. B2

appeal. If your in forma pauperis status has been revoked by the District Court, you must file a motion to proceed in forma pauperis with this Court. This Court will send a letter informing you of the need to either pay at the fee or file the motion. If you paid the fee below, but cannot afford to pay at the Court of Appeals, you may file a motion to appeal in forma pauperis first in the District Court: if that request is denied, you may file a request in this Court.

Q. Do I have to fill out forms C and D?

A. Pro Se appellants do not need to fill out form C (Pre-argument Statement) or form D (Transition Information).

Q. Will this Court have a record of the proceedings in the District Court?

A. The District Court will compile and forward the Record on Appeal to this Court. However, if there were proceedings before the District Court (trial or hearings) and the appellant wants to challenge a "finding or conclusion" made therein, he or she must "include in the record a transcript of all evidence relevant to such finding or conclusion." Fed. R. App. P. 10(b)(2). Appellants can order transcripts from the court reporter who recorded the relevant proceeding.

Q. What happens next? How long does the process take?

A. It takes approximately two weeks for a notice of appeal from the District Court to be forwarded to this Court. After that point, a scheduling order is issued, unless motions are filed. If motions are filed, such as for in forma pauperis status, appointment of counsel or transcripts, etc., the operation of scheduling order will be suspended pending determination of the motion. Before granting such motions, the Court must examine the record to determine that there are non-frivolous issues in the appeal. If no non-frivolous issues are found, the appeal may be dismissed.

Once the motion is decided, a new scheduling order will be issued, assuming the appeal was not dismissed. The scheduling order will give a date by which each party's appellate brief must be submitted. (See below for answers to questions about briefs). After the parties submit briefs, oral argument will be held in front of a panel of three judges. At argument, the litigant may explain orally why he or she feels the disposition in the District Court should be reversed (or affirmed).

FORM C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT

1. SEE NOTICE ON REVERSE. 2. PLEASE TYPE OR PRINT. 3. ATTACH ADDITIONAL PAGES IF NECESSARY.

Title of Case:	District or Agency	Judge
	Date Filed in District Court or Agency	District Court Docket No.
	Date Notice of Appeal Filed	Is this a Cross Appeal? ☐ Yes ☐ No

Attorney(s) for	Name	Address	Telephone
Appellant ☐ Plaintiff ☐ Defendant			
Appellee ☐ Plaintiff ☐ Defendant			

Has Transcript Been Prepared?	Approx. Number of Transcript Pages	Number of Exhibits	Has this matter been before this Court previously? ☐ Yes ☐ No If Yes, state Case Name: Docket No.: Citation:

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

ISSUES PROPOSED TO BE RAISED ON APPEAL:

A. JURISDICTION

1. Federal

☐ U.S. a party
☐ Federal question (U.S. not a party)
☐ Diversity
☐ Other (specify): _____

2. Appellate

☐ Final Decision below
☐ Interlocutory decision appealable as of right
☐ Order Certified by District Judge (specify): _____
☐ Other (specify): _____

IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.

FORM C

B. DISTRICT COURT DISPOSITION (Check as many as apply)

1. Stage of Proceedings	2. Type of Judgment/Order Appealed	3. Relief
☐ Pre-trial ☐ During trial ☐ After trial	☐ Default judgment ☐ Dismissal/jurisdiction ☐ Dismissal/merit ☐ Summary judgment ☐ Declaratory judgment ☐ Judgment / court decision ☐ Jury verdict ☐ Judgment NOV ☐ Directed verdict ☐ Other (specify):	☐ Damages: ___ Sought: $_____ ___ Granted: ___ Denied: $_____ ☐ Injunctions: ___ Preliminary ___ Permanent ___ Granted ___ Denied

C. NATURE OF SUIT (Check as many as apply)

1. Federal Statutes

☐ Antitrust
☐ Bankruptcy
☐ Banks/Banking
☐ Civil Rights
☐ Commerce, routes and tariffs
☐ Commodities
☐ Other (specify):
☐ Communications
☐ Consumer Protection
☐ Copyright ☐ Patent
☐ Trademark
☐ Election
☐ Energy
☐ Environmental
☐ Freedom of Information
☐ Immigration
☐ Labor
☐ OSHA
☐ Securities
☐ Soc. Security
☐ Tax

2. Torts

☐ Admiralty/ Maritime
☐ Assault / Defamation
☐ FELA
☐ Product Liability/Warranty
☐ Other (Specify):

3. Contracts

☐ Admiralty/ Maritime
☐ Arbitration
☐ Commercial
☐ Employment
☐ Insurance
☐ Negotiable Instruments
☐ Other (Specify):

4. Prisoner Petitions

☐ Civil Rights
Habeas Corpus
___ 2254
___ 2255
☐ Mandamus
☐ Parole
☐ Vacate Sentence
☐ Other

5. Other

☐ Forfeiture/Penalty
☐ Real Property
☐ Treaty (specify): _____
☐ Other (specify): _____

6. General

☐ Arbitration
☐ Attorney Disqualification
☐ Class Action
☐ Counsel Fees
☐ Shareholder Derivative
☐ Transfer

7. Will appeal raise constitutional issue?
☐ Yes ☐ No

Will appeal raise a matter of first impression?
☐ Yes ☐ No

Is any matter relative to this case pending below? ☐ Yes ☐ No (specify):

To your knowledge, is there any case now pending or about to be brought before this Court or any other court or administrative agency which
(A) arises from substantially the same case or controversy as this appeal? ☐ Yes ☐ No
(B) involves an issue that is substantially the same, similar, or related to an issue in this appeal? ☐ Yes ☐ No
If yes, state whether ☐ "A" or ☐ "B" or ☐ both, and provide:

Case Name:	Docket No.	Citation:	Court or Agency:

Name of Appellant:

Date:	Signature of Counsel of Record

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court and have paid the $5 filing fee, you have only ten (10) days in which to docket your appeal. You must take the following steps within those ten (10) days:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Court of Appeals.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Court of Appeals.
3. Pay the $100 docketing fee to the Clerk of the United States District Court, unless you are authorized to prosecute the appeal without payment.

IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) DAYS, YOUR APPEAL WILL BE DISMISSED.
(NOTE: This form is not required of non-attorney *pro se* litigants.)
SEE THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPENDIX C

APP. C2

FORM D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRANSCRIPT INFORMATION
CIVIL APPEAL

To be completed by counsel for appellant in civil appeal from district court with in ten days after filing notice of appeal.

THIS SECTION TO BE COMPLETED BY COUNSEL FOR APPELLANT		
CASE TITLE	DISTRICT	DOCKET NUMBER
	JUDGE	APPELLANT
	COURT REPORTER	COUNSEL FOR APPELLANT

TRANSCRIPT ORDER - Must be completed

DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATES). I am ordering a transcript. I am not ordering a transcript Reason: ☐ Daily copy is available ☐ Other - Attach explanation	METHOD OF PAYMENT ☐ Funds ☐ CJA Voucher (CJA 21)
☐ PREPARE TRANSCRIPT OR PRE-TRIAL PROCEEDINGS ☐ PREPARE TRANSCRIPT OF TRIAL ☐ PREPARE TRANSCRIPT OF OTHER POST-TRIAL PROCEEDINGS ☐ PREPARE (Other: Specify)	DELIVER TRANSCRIPT TO: (NAME, ADDRESS, TELEPHONE)

I certify that I have made satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)). I understand that unless I have already ordered the transcript, I shall order its preparation at the time required by the Civil Appeals Management Plan, F.R.A.P. and the local rules.

COUNSEL'S SIGNATURE	DATE

COURT REPORTER ACKNOWLEDGMENT (To be completed by court reporter. Return one copy to: Clerk of Court, U.S. Court of Appeals, Second Circuit)

DATE ORDER RECEIVED	ESTIMATED COMPLETION DATE	ESTIMATED NUMBER OF PAGES
SIGNATURE OF COURT REPORTER		DATE

APP. D1

FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

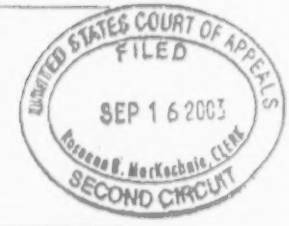
DC Initials: DCCT/NHCT
DC DKT # 95-cv-995
DC Judge: COVELLO

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of September two thousand three.

Tibbetts

v.

Dittes



Docket No. 01-7377

The Civil Appeal Management Plan of this Court Directs that within the (10) days after filing a Notice of Appeal, the Appellant shall file and serve a Pre-Argument Statement (FORM C), order a transcript of the proceedings from the court reporter and file and serve a statement concerning same (FORM D), pay docketing fee, and, that in the event of default of any of these requirements, the Clerk may dismiss the appeal without further notice.

The appellant herein not having so proceeded, upon consideration thereof, it is ordered that the appeal from the order of 3/22/01 United States District Court for the District of Connecticut New Haven be and it hereby is dismissed.

ROSEANN B. MACKECHNIE, Clerk

By: Tammy Martinez
Tammy Martinez
Deputy Clerk, USCA

APP. E1

CIVIL APPEALS MANAGEMENT PLAN

1. **Notice of Appeal, Transmission of Copy and Entry by Court of Appeals.**

Upon the filing of a notice of appeal in a civil case, the Clerk of the District Court shall forthwith transmit a copy of the notice of appeal to the Clerk of the Court of Appeals, who shall promptly enter the appeal upon the appropriate records of the Court of Appeals.

2. **Appointment of Counsel for Indigent, Advice by District Court Judge.**

If the appeal is in an action in which the appellant may be entitled to the discretionary appointment of counsel under 18 U.S.C. § 3006A(g) but has not had such counsel in the district court and there has been an indication that the appellant may be indigent, the judge who heard the case shall advise the Clerk of the Court of Appeals whether in the judge's judgment such appointment would be in the interests of justice.

3. **Docketing the Appeal; Filing Pre-Argument Statement; Ordering Transcript.**

Within ten calendar days (see FRAP 26(a)) after filing the notice of appeal, the appellant shall cause the appeal to be docketed by taking the following actions:

(a) filing with the Clerk of the Court of Appeals an original and one copy of, and serving on other parties a pre-argument statement (Form C or Form C-A, in the case of a petition for review or enforcement of an agency decision, with such changes as the Chief Judge of this Court may from time to time direct) detailing information needed for the prompt disposition of an appeal;

(b) ordering from the court reporter on a form to be provided by the Clerk of the Court of Appeals (Form D), a transcript of the proceedings pursuant to FRAP 10(b). If desirable the transcript production schedule and the portions of the proceedings to be transcribed shall be subject to determination at the pre-argument conference, if one should be held, unless the appellant directs the court reporter to begin transcribing the proceedings immediately;

(c) certifying that satisfactory arrangements have been or will be made with the court reporter for payment of the cost of the transcript;

(d) paying the docket fee fixed by the Judicial Conference of the United States

(b) At the conclusion of the conference the staff counsel shall enter a pre-argument conference order which shall control the subsequent course of the proceeding.

6. **Non-Compliance Sanctions.**

(a) If the appellant has not taken each of the actions set forth in paragraphs 3(a), (b), (c), and (d) of this Plan within the time therein specified, the appeal may be dismissed by the Clerk without further notice.

(b) With respect to docketed appeals in which a scheduling order has been entered, the Clerk shall dismiss the appeal upon default of the appellant regarding any provision of the schedule calling for action on the appellant's part, unless extended by the Court. An appellee who fails to file an appellee's brief within the time limited by a scheduling order or, if the time has been extended as provided by paragraphs 6 or 8, within the time as so extended, will be subjected to such sanctions as the Court may deem appropriate, including those provided in FRAP 31(c) or FRAP 39(a) or Rule 38 of the Local Rules of this Court supplementing FRAP or the imposition of a fine.

(c) In the event of default in any action required by a pre-argument conference order not the subject of the scheduling order, the Clerk shall issue a notice to the appellant that the appeal will be dismissed unless, within ten days thereafter, the appellant shall file an affidavit showing good cause for the default and indicating when the required action will be taken. The staff counsel shall thereupon prepare a recommendation on the basis of which the Chief Judge or any other judge of this Court designated by the Chief Judge shall take appropriate action.

7. **Motions**

Motions for leave to file oversized briefs, to postpone the date on which briefs are required to be filed, or to alter the date on which argument is to be heard, shall be accompanied by an affidavit or other statement and shall be made not later than two weeks before the brief is due or the argument is scheduled unless exceptional circumstances exist. Motions not conforming to this requirement will be denied.

Motions to alter the date of arguments placed on the calendar are not viewed with favor and will be granted only under extraordinary circumstances.

T 1080

DCCT/WHCT
95 cv 995
Covello

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues (Local Rule 27(d)) and a memorandum of law with page references to the moving papers.

TIBBETTS V. DITTES

01-7377
Docket Number

MOTION

INFORMATION FORM

UNITED STATES COURT OF APPEALS
FILED
OCT 16 2003
SECOND CIRCUIT

Use short title

Nature of Motion: REINSTATEMENT OF APPEAL

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of case)

Jeffrey Babbin
Wiggin & Dana
P.O. Box 1832
New Haven, CT 06508

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and attorney in charge of case)

Has consent of opposing counsel:

A. been sought? Yes No
B. been obtained? Yes No

Has service been effected? Yes No
Is oral argument desired? Yes No
(Substantive motions only)

Requested return date: _____
(See Second Circuit Rule 27(b).)
Has argument date of appeal been set:
A. by scheduling order? Yes No
B. by Form date/argument notice? Yes No
C. If yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
(See F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? Yes No

Would expedited appeal eliminate need for this motion? Yes No
If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? Yes No

Judge or agency whose order is being appealed: Alfred V. Covello, USDJ (Conn.)

Brief statement of the relief requested:

Jeffrey L. Tibbetts

By: (Signature of Attorney)
Signed name must be printed beneath

JEFFREY L. TIBBETTS, PRO SE

Appearing for: (Name of Party)

Appellant or Petitioner: Plaintiff Defendant
Appellee or Respondent: Plaintiff Defendant

Date: OCTOBER 16, 2003

ORDER

Before: Hon. Reena Raggi, *Circuit Judge*

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

Laura Bass Penn

Laura Bass Penn, Motions Staff Attorney

12/8/03
Date

UNITED STATES COURT OF APPEALS
FILED
DEC 8 - 2003
SECOND CIRCUIT

SA 161

APP. G1

17

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

FILED

2004 JUN 28 A 11: 36

U.S. DISTRICT COURT
HARTFORD CT

JEFFREY TIBBETTS,)
)
v.) HAR No. 3:03CV00995 (CFD) (AVC)
)
JAMES DITTES, ET AL,)
) June 28, 2004

PLAINTIFF'S RULE 60(B)(4) MOTION TO VAC

TABLE OF CONTENTS

I. ISSUES .....

II. RULE 60(B)(4) .....

III. FACTS AND PROCEEDINGS IN THE SECOND CIRCU

... PLAINTIFF FILED ALL DOCUMENTS UNDER CAMP.

V. LACK OF NOTICE IN SECOND CIRCUIT'S LOCAL RI VIOLATES PLAINTIFF'S RIGHT TO DUE PROCESS .

A. Second Circuit Local Rules Contain No Regulation the Procedure For Transferring a Pro Se Appeal ..

B. Defendants File Motion to Dismiss on a Rule That Does Not Exist in the Second Circuit Local Ru

C. Second Circuit Violates Plaintiff's Right to Due Pro Dismissing Appeal For a Rule That Does Not Exist .

D. Second Circuit Violated FRAP 47 in Dismissing Ap

VI. THE SECOND CIRCUIT VIOLATES PLAINTIFF'S GU OF DUE PROCESS UNDER THE FIFTH AND FOURTE AMENDMENTS OF THE CONSTITUTION .....

VII. THE SECOND CIRCUIT ACTED IN A MANNER INCO WITH DUE PROCESS OF LAW AND THE DISMISSAL SHOULD BE VACATED PURSUANT TO F.R.CIV.P. 60

CONCLUSION .....

3:03CV00995 (AVC). The motion is denied as the court has no jurisdiction to review a decision of the United States Court of Appeals for the Second Circuit dismissing this appeal.

Alfred V. Covello, U.S.D.J.

FILED

APP. HI

250

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

FILED
2004 NOV 19 A 8:53
U.S. DISTRICT COURT
HARTFORD, CT.

JEFFREY TIBBETTS,

v.

JAMES DITTES, ET AL,

No. 395CV00995 (AVC)

November 19, 2004

RULE 60(B)(4) MOTION TO VACATE JUDGMENT AS VOID FOR VIOLATIONS OF DUE PROCESS

3:95cv995 (AVC). January 5, 2004. The motion is denied as the plaintiff has failed to persuade the court that it acted inconsistent with due process of law and, accordingly, the court does not perceive the judgment as void for purposes of vacatur under Fed. R. Civ. P. 60(b)(4). Further, because the plaintiff had the opportunity to raised the issues on appeal, but failed to do so, the plaintiff is now "barred by principles of res judicata and the interest in finality of judgments from mounting a collateral attack on a prior judgment in the present action." Nemaizer v. Baker, 793 F.2d 58, 64 (2d Cir. 1986).

SO ORDERED.

Alfred V. Covello, U.S.D.J.

FILED
2005 JAN -5 P 2:32
U.S. DISTRICT COURT
HARTFORD, CT.

APP. 11

DC/New haven
95-CV-995
Hon. Covello

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

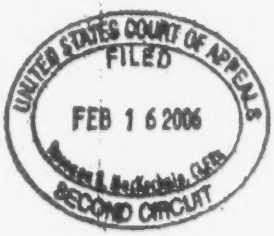
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ninth day of February, two thousand and six.

PRESENT: HON. DENNIS JACOBS,
HON. RICHARD C. WESLEY,
HON. JOHN R. GIBSON*,

Circuit Judges.



- X

JEFFREY TIBBETTS,

Plaintiff-Appellant,

-v.- No. 05-0694-cv

JAMES DITTES, YALE DIVINITY SCHOOL, YALE CORP., THOMAS OGLETREE, PENELOPE LAURENS, and DETRA MACDOUGALL,

Defendants-Appellees.

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*The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

- - - - - - - - - - - - - - - - - -
X

FOR APPELLANT: PAUL SCHIFF BERMAN, West Hartford, CT, on the brief.

APPEARING FOR APPELLEE: JEFFREY R. BABBIN, Wiggin and Dana LLP, New Haven, CT, for DEFENDANTS-APPELLEES.

Appeal from an order of the district court denying Plaintiff's motions to vacate.

UPON DUE CONSIDERATION, it is **ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

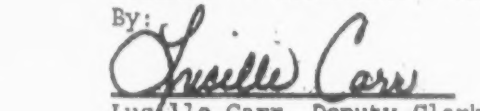
Jeffrey Tibbetts appeals from an order of the district court entered January 5, 2005 by the United States District Court for the District of Connecticut (Covello, J.) denying motions made under Fed. R. Civ. P. 60(b)(4). We assume familiarity with the facts, the procedural history, and the issues on appeal.

Tibbetts appeals the order denying his November 19, 2004 Rule 60(b)(4) "Motion to Vacate Judgment as Void for Violations of Due Process." In reviewing the order denying a 60(b) motion on appeal, this Court reviews "only the denial of the motion and not the merits of the underlying judgment for errors that could have been asserted on direct appeal." Branum v. Clark, 927 F.2d 698, 704 (2d Cir. 1991). Review by this Court is de novo. State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 179 (2d Cir. 2004), cert. denied, 125 S. Ct. 1309 (2005). Tibbetts fails to present, and the record does not reveal, any of the "highly convincing" evidence required to grant a motion to vacate the judgment as void. Kotlicky v. U.S. Fidelity & Guar. Co., 817 F.2d 6, 9 (2d Cir. 1987). Therefore, the district court did

not err in denying Tibbetts's November 19, 2004 60(b)(4) motion.

For the foregoing reasons, the judgment of the district is affirmed. Appellant is to bear costs. The mandate shall issue immediately.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:



Lucille Carr, Deputy Clerk

D. Conn.
05-cv-995
Covello, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 10th day of August two thousand and six,

Present:

Hon. Chester J. Straub,
Hon. Rosemary S. Pooler,
Hon. Robert D. Sack,
Circuit Judges.

Jeffrey P.L. Tibbetts,

Plaintiff-Appellant,

v. 05-4695-cv

James E. Dittes, Professor of Pastoral Theology & Psychology, I/O/, et al.,

Defendants-Appellees

Tibbetts appeals the district court's dismissal of his renewed Rule 60(b)(4) motion and three motions for clarification. The Appellees move for summary affirmance of the district court's order. Upon due consideration, it is ORDERED that the motion is GRANTED and the appeal is DISMISSED because Tibbetts's appeal is without merit. *See Der-Rong Chour v. INS*, 578 F.2d 464, 468-69 (2d Cir. 1978).

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: Lucille Carr

AUG 10 2006

APP. K1

SAO-MCM

STIEHM LAW OFFICE

4308 Lawrence Street
Alexandria, VA 22309

Phone
Voice 703-360-1069 Fax 703-933-0166
Mobil 703-863-6838
E-mail s[illegible]law.vsp.com
Web Site http://[illegible].findlaw.com/pstiehm

PATRICK H. STIEHM
Admitted: Virginia, Maryland & Minnesota

April 28, 2006

VIS FEDEX

Ms. Roseann B. Mackechnie
Clerk
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York, NY 10007

Re: Filing procedures for pro se appeals that are currently docketed and pending

Dear Ms. Mackechnie:

I am considering filing a notice of appearance in several appeals, which are presently pro se.

I am unclear, however, concerning the Second Circuit Local Rules as they pertain to counsel filing an appearance after a *pro se* appeal has already been filed and docketed. It is my understanding that all counsel requirements pertain to docketing a new appeal. Out of an abundance of caution, I am requesting information on how this administrative procedure may be effected. I am informed that only a notice of appearance is necessary, and that forms C and D are unnecessary, since the appeal has already been docketed, and that, upon the filing of a notice of appearance by an attorney, there is only a need for a revised briefing schedule. If you would please provide me directions as to how the Second Circuit would like to have this administrative matter handled, I would be most appreciative.

Sincerely,

Patrick H. Stiehm

PHS/egj

APP. L1

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIBBETTS v. STEMPEL	:	No. 05-5873, 05-5826, 05-5830
	:	June 29, 2006

APPELLANT'S MOTION FOR FILING PROCEDURES

Comes Now the Appellant Pro Se to respectfully request the filing and scheduling procedures for counsel in *pro se* appeals. Currently the Local Rules of the Second Circuit contain no rules, regulations, or guidelines on filing and scheduling procedures for counsel in *pro se* appeals. The Second Circuit Local Rules are devoid on these procedures, and the interpretation of existing rules is ambiguous. For example, the Local Rules instruct counsel to file Forms C and D as proper appellate procedure for docketing an appeal, however this requirement is "waived" in *pro se* appeals. Accordingly, if counsel enters an appearance in a *pro se* appeal, there are no guidelines as to whether this counsel must files Forms C and D, as previously "waived," or whether counsel must file Forms C and D anew. Precisely because there are no published rules, regulations, or guidelines on this matter, it is understandable that the Clerk of the Court is not able to provide instructions on this matter, without further directions from the Court. *See* attached letters to the Clerk requesting information on same.

Wherefore to facilitate this appeal in particular, and to facilitate other similarly situated *pro se* appeals in general, it is respectfully requested that the Court provide rules and guidance on this matter.

Jeffrey L. Tibbetts
P.O. Box 9843
Arlington, VA 22219
301-469-6066 (home)
703-953-8978 (cell phone)
tibbetts@aya.yale.edu

August 10, 2006

Ms. Roseann B. Mackechnie
Clerk
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York, NY 10007

RE: Status on Court's Rules for Counsel Appearance in *Pro Se* Appeals

Dear Ms. Mackechnie:

I have written and filed motions regarding the lack of rules and regulations for counsel entering appearances in *pro se* appeals.

The issue here is where counsel must file pre-docketing Forms C and D in counseled appeals, whether this requirement is "waived" in *pro se* appeals. As you know, the Second Circuit Local Rules specifically "waive" the filing requirement of Forms C and D in *pro se* appeals. Yet the Second Circuit Local Rules are silent as to whether counsel must file these forms in *pro se* appeals.

The Second Circuit is unique among the U.S. Court of Appeals for requiring the filing of Forms C and D for its docketing procedures. Accordingly, where there is an obvious discrepancy over what rules apply in this unique filing scenario, the Second Circuit has a heightened obligation to ensure due process considerations (i.e. "notice") have been satisfied regarding the filing procedures for *pro se*-to-counseled appeals. As already noted, the Second Circuit Local Rules are completely silent on this fundamental due process requirement concerning notice as to whether Forms C and D are required in *pro se*-to-counseled appeals.

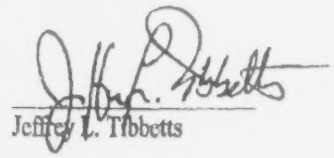
I retained counsel, Patrick Stiehm, who has asked the same questions. Patrick Stiehm has been representing my legal interests for the past three years. However for some unexplicable reason, he recently wrote letters to you and other deputy clerks stating that he does not recall representing me in these appeals. Although I have since produced his own written agreements and letters to the contrary, I still require an answer to my request regarding the Second Circuit's filing procedures for the applicability of Forms C and D in *pro se*-to-counseled appeals.

regarding the Second Circuit's filing procedures for the applicability of Forms C and D in *pro se*-to-counseled appeals.

Even if Mr. Stiehm no longer continues to represent my interests in this appeal, I still have substitute counsel who requires clarification of these filing procedures regarding the applicability of Forms C and D in a *pro se*-to-counseled appeals. Equally important, the Court must still address due process concerns regarding published "notice" requirements in the Second Circuit Local Rules.

I am looking forward to receiving the Court's clarification on these filing procedures.

Very respectfully,



Jeffrey L. Tibbetts

cc: Ms. Anna Steglich, Tibbetts v. Dittes, No. 05-4695
Ms. Debra Holmes, Tibbetts v. President and Fellows, No. 05-5780
Mr. Eddie Andino, Tibbetts v. Stempel, Consolidated (Nos. 05-5873, 05-5826, 05-5830)

Attachment

VIA FAX (212) 857-8681

February 3, 2006

Calendar Team
USCA for the Second Circuit
40 Foley Square
New York, NY 10007

Re: Tibbetts v. Dittes, No. 05-0694cv

To Whom It May Concern:

On behalf of appellant Jeffrey Tibbetts, I write in response to Appellees' letter, dated February 2, 2006, which was filed pursuant to FRAP 28(j).

Appellees' letter, like their brief, operates under the assumption that Mr. Tibbetts "did not pursue a direct appeal to conclusion." Accordingly, Appellees argue that, because Mr. Tibbetts failed to raise issues on direct appeal, those issues should not be heard as part of a Rule 60(b)(4) motion. Yet, while *Wendt v. Leonard*, 431 F.3d 410 (4th Cir. 2005), does discuss (though does not resolve) the 60(b)(4) question, it in no way addresses Appellees' erroneous factual premise. As discussed in Appellant's Reply Brief, at page 5-6, Mr. Tibbetts *tried* to pursue his direct appeal to conclusion, but was thwarted by an ambiguity with regard to this Court's Local Rules (and incorrect information dispensed by this Court's Clerk's office). Specifically, the Rules do not make clear whether a pro se litigant (who ordinarily need not file Forms C and D) must *subsequently* file such forms if he retains counsel while the appeal is pending. Because Mr. Tibbetts' failure to file Forms C and D was caused by this ambiguity and was clearly nonwillful, dismissal of his appeal was an unwarranted sanction. *See* Fed. R. App. P. 47(a)(2) (2000) (a "local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.") (emphasis added). As a result, the principles discussed in *Wendt* do not apply here.

On a related note, I have today sent a letter to this Court's Rules Committee, respectfully requesting that the practice regarding Forms C and D be clarified in the Court's Local Rules to remove the ambiguity that has caused Mr. Tibbetts such difficulty. That letter is appended to this one.

Respectfully Submitted,

Paul Schiff Berman
40 West Hill Drive
West Hartford, CT 06119

cc: Jeffrey R. Babbin (via e-mail and first class mail)
Jeffrey L. Tibbetts (via e-mail and first class mail)

I certify that the body of this letter is 306 words, within the 350 word limit of Rule 28(j).

Paul Schiff Berman

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIBBETTS v. LEVIN (LEAD CASE)	:	No. 05-5826-CV(L)
consolidated with	:	
TIBBETTS v. ROBINSON	:	No. 05-5830-CV
TIBBETTS v. STEMPEL	:	No. 05-5873-CV

MEMORANDUM OF LAW IN SUPPORT OF A MOTION TO RECALL MANDATE IN *TIBBETTS v. DITTES* (01-7377) FOR "NOTICE" INFIRMITIES IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION

TABLE OF CONTENTS

I. REVIEW OF SECOND CIRCUIT LOCAL RULES AND THE CIVIL APPEAL MANAGEMENT PLAN (CAMP) 1

(1) Counseled Appeals 1

(2) Pro Se Appeals 3

(3) *Pro se*-to-Counseled Appeals are Unique 4

(4) Implementation of CAMP and Forms C & D Pursuant to 28 U.S.C. § 2071 6

(5) Application of Forms C & D Are Inconsistent in Pro Se-to-Counseled Appeals 7

(6) Second Circuit Uses Unauthorized General Dismissal Mandates to Dismiss Pro Se-to-Counseled Appeals 9

(7) Second Circuit Violates the "Notice" Requirements of FRAP 47 10

(8) Second Circuit Delegates Unconstitutional Decision-Making Authority to the Clerk's Office 14

II. REVIEW OF CONSTITUTIONAL "NOTICE" INFIRMITIES IN *TIBBETTS v. DITTES* (01-7377) 17

(1) Proceedings in the U.S. District Court 17

(2) Proceedings in the Second Circuit 18

(3) Second Circuit Dismissed *Dittes* Without "Notice" 21

(4) Second Circuit Dismissed *Dittes* Through an Inconsistent Application of Forms C & D 22

(5) Second Circuit dismissed *Dittes* in Violation of Local Rule 27(c) 24

III. POST RULE 60(B) MOTIONS FILED TO CORRECT THE CONSTITUTIONAL "NOTICE" INFIRMITIES IN *DITTES* ... 26

(1) Appellant Files *Dittes II* to Challenge the Unconstitutional Dismissal of *Dittes* 26

(2) Appellant Files *Dittes III* to Challenge the Unfair Trial in *Dittes* 27

(3) District Court Summarily Dismissed *Dittes II* & *Dittes III* .. 27

(4) *Dittes II* and *Dittes III* Appealed to the Second Circuit 28

(5) Second Circuit Enters Summary Affirmance in *Dittes II*... 30

(6) Second Circuit Continues Haphazard "Notice" Procedures In Pro Se-To-Counseled Appeals 31

IV. SUMMARY OF ARGUMENT 35

V. ARGUMENT 38

A. The Due Process Clause 38

(1) Due Process Violation Requires Deprivation of Protected Interests 41

(2) Second Circuit Fails to Provide "Notice" in Governmental Publications 43

(3) Judgments May be Vacated for Due Process Violations 44

(4) Appellant Satisfies Test for Due Process Violation 45

(5) Lack of "Notice" Raises 'Void For Vagueness Doctrine' ... 49

B. The Equal Protection Clause 52

VI. 'SET ASIDE' IS REMEDY TO CORRECT OFFENDING DUE PROCESS VIOLATION 54

(1) *Armstrong* Due Process Analysis in *Dittes* 58

(2) *Armstrong* Due Process Analysis in *Dittes II* and *Dittes III* .. 60

VII. COURT HAS INHERENT POWER TO REVIEW DUE PROCESS VIOLATIONS 64

(1) FRAP 2 Provides Inherent Authority to Recall Mandates .. 64

(2) Second Circuit has Inherent Power to Recall Mandates 66

(3) *Dittes* Mandate Has Procedural Irregularities in Violation of Local Rule 27(c) and FRAP 47 67

(A) *Dittes* Mandate Issued in Violation of Local Rule 27(c) 68

(B) Second Circuit Case Law Demonstrates the Procedural Irregularity in *Dittes* Mandate 71

(C) *Dittes* Mandate Constitutes "Manifest Injustice" 74

(4) *Dittes* Mandate Violates the Congressional "Intent" in FRAP 47 77

VIII. CONCLUSION 83

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)

1. SEE NOTICE ON REVERSE. **2. PLEASE TYPE OR PRINT.** **3. STAPLE ALL ADDITIONAL PAGES**

Case Caption:	District Court or Agency:	Judge:
	Date the Order or Judgment Appealed from was Entered on the Docket:	District Court Docket No.:
	Date the Notice of Appeal was Filed:	Is this a Cross Appeal? ☐ Yes ☐ No

Attorney(s) for Appellant(s): ☐ Plaintiff ☐ Defendant	Counsel's Name: Address: Telephone No.: Fax No.: E-mail:
Attorney(s) for Appellee(s): ☐ Plaintiff ☐ Defendant	Counsel's Name: Address: Telephone No.: Fax No.: E-mail:

Has Transcript Been Prepared?	Approx. Number of Transcript Pages:	Number of Exhibits Appended to Transcript:	Has this matter been before this Circuit previously? ☐ Yes ☐ No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (i.e., F.3d or Fed. App.)

***ADDENDUM "A"*: COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; (3) A COPY OF THE NOTICE OF APPEAL AND A CURRENT COPY OF THE LOWER COURT DOCKET SHEET; AND (4) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS APPEAL, INCLUDING TRANSCRIPTS OF ORDERS ISSUED FROM THE BENCH OR IN CHAMBERS.**

***ADDENDUM "B"*: COUNSEL MUST ATTACH TO THIS FORM A LIST OF THE ISSUES PROPOSED TO BE RAISED ON APPEAL, AS WELL AS THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.**

PART A: JURISDICTION

1. Federal Jurisdiction		2. Appellate Jurisdiction	
☐ U.S. a party	☐ Diversity	☐ Final Decision	☐ Order Certified by District Judge (i.e., Fed. R. Civ. P. 54(b))
☐ Federal question (U.S. not a party)	☐ Other (specify): _____	☐ Interlocutory Decision Appealable As of Right	☐ Other (specify): _____

IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.

APP. N1

PART B: DISTRICT COURT DISPOSITION (Check as many as apply)

1. Stage of Proceedings

- ☐ Pre-trial
- ☐ During trial
- ☐ After trial

2. Type of Judgment/Order Appealed

- ☐ Default judgment
- ☐ Dismissal/jurisdiction
- ☐ Dismissal/merit
- ☐ Summary judgment
- ☐ Declaratory judgment
- ☐ Judgment / Decision of the Court
- ☐ Jury verdict
- ☐ Judgment NOV
- ☐ Directed verdict
- ☐ Other (specify):

3. Relief

- ☐ Damages:
  - ☐ Sought: $ _____
  - ☐ Granted: $ _____
  - ☐ Denied: $ _____
- ☐ Injunctions:
  - ☐ Preliminary
  - ☐ Permanent
  - ☐ Denied

PART C: NATURE OF SUIT (Check as many as apply)

1. Federal Statutes

- ☐ Antitrust
- ☐ Bankruptcy
- ☐ Banks/Banking
- ☐ Civil Rights
- ☐ Commerce,
- ☐ Energy
- ☐ Commodities
- ☐ Other (specify): _____
- ☐ Communications
- ☐ Consumer Protection
- ☐ Copyright ◻ Patent
- ☐ Trademark
- ☐ Election
- ☐ Soc. Security
- ☐ Environmental
- ☐ Freedom of Information Act
- ☐ Immigration
- ☐ Labor
- ☐ OSHA
- ☐ Securities
- ☐ Tax

2. Torts

- ☐ Admiralty/ Maritime
- ☐ Assault / Defamation
- ☐ FELA
- ☐ Products Liability
- ☐ Other (Specify):

3. Contracts

- ☐ Admiralty/ Maritime
- ☐ Arbitration
- ☐ Commercial
- ☐ Employment
- ☐ Insurance
- ☐ Negotiable Instruments
- ☐ Other Specify

4. Prisoner Petitions

- ☐ Civil Rights Habeas Corpus
- ☐ Mandamus
- ☐ Parole
- ☐ Vacate Sentence
- ☐ Other

5. Other

- ☐ Forfeiture/Pena ty
- ☐ Real Property
- ☐ Treaty (specify): _____
- ☐ Other (specify): _____

6. General

- ☐ Arbitration
- ☐ Attorney Disqualification
- ☐ Class Action
- ☐ Counsel Fees
- ☐ Shareholder Derivative
- ☐ Transfer

7. Will appeal raise constitutional issue(s)?

☐ Yes ☐ No

Will appeal raise a matter of first impression?

☐ Yes ☐ No

1. Is any matter relative to this appeal still pending below? ☐ Yes, specify: _____ ☐ No

2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:

   (A) Arises from substantially the same case or controversy as this appeal? ☐ Yes ☐ No

   (B) Involves an issue that is substantially similar or related to an issue in this appeal? ☐ Yes ☐ No

If yes, state whether ☐ "A," or ☐ "B," or ☐ both are applicable, and provide in the spaces below the following information on the *other* action(s):

Case Name:	Docket No.	Citation:	Court or Agency:

Name of Appellant:

Date:	Signature of Counsel of Record:

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court, you have only 14 days in which to complete the following important steps:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Second Circuit in accordance with LR 25.1.
3. Pay the $455 docketing fee to the Clerk of the United States District Court unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 DAYS, YOUR APPEAL WILL BE DISMISSED. *SEE* LOCAL RULE 12.1.

APPENDIX N

APP. N2

DEPARTMENT OF THE ARMY
CHARLIE COMPANY, 450TH CIVIL AFFAIRS BATTALION (AIRBORNE)
5601 BALTIMORE AVENUE
RIVERDALE, MARYLAND 20737-1025

REPLY TO
ATTENTION OF

ARRC-CPC-BBCC

16 October 2010

MEMORANDUM FOR RECORD

SUBJECT: Servicemembers Civil Relief Act

1. CPT Geoffrey L. Tibbetts served in Operation Iraqi Freedom from 29 October 2008 to 8 March 2010. A copy of his official DD 214 is attached.

2. The Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 522(a)(1), provides a stay of proceedings whenever a servicemember is "in military service or is within 90 days after termination or release from military service." Accordingly, any legal obligations of CPT Tibbetts shall commence 90 days after his release from military service on 8 March 2010, or by 6 June 2010.

Encl

JOHANNA L. KNOCH
MAJ, CA
Commanding

APP. 01

DEPARTMENT OF THE ARMY
HUMAN RESOURCES MILITARY TRANSITION ACTIVITY
FORT DIX, NEW JERSEY 08640-5089

IMNE-DIX-HRM 10 September 2010

MEMORANDUM FOR

(X) SRDC-RDMB- ST. LOUIS ATTN: AHRC-CISP-P, 1 RESERVE WAY, ST LOUIS, MO 63132-5200 (Discharge/Retired Soldiers and Reserve Soldiers).
( ) SRDC-RDMB-ALEXANDRIA ATTN: AHRC-MSR, RM 5N63, 200 STOVALL STREET, ALEXANDRIA VA 22332-0444 (Active Duty Officers).
( ) SRDC-RDMB- INDIANAPOLIS, ATTN: AHRC-EFI, 8899 E 56TH STREET, INDIANAPOLIS, IN 46249-5301(Active Duty Enlisted).
( ) COMMANDER, HRC-A ATTN: AHRC-EPF-P, 2461 EISENHOWER AVENUE, ALEXANDRIA, VA 22331-0457 (Reentry Eligibility (RE) Code Correction).

SUBJECT: Request for correction of DD Form 214, Certificate of Release or Discharge from active duty.

1. The DD Form 214 on the following soldier contained the discrepancy indicated.

NAME	SSN	RANK	EFFECTIVE DATE
TIBBETTS, GEOFFREY	096-42-3413	CPT	2010 03 08

ITEM	AS READ	SHOULD READ
#12B	2010 02 17	2010 03 08
#12C	0001 00 26	0001 01 17
#16	0	8.0
#18	REMOVE PDMRA FROM 20100129 TO 20100129 ADD PDMRA FROM 20100129 TO 20100223	

----------NOTHING FOLLOWS----------

2. Request correction is made in accordance with Chapter 2, Section I, paragraph 2-6c, AR 635-5.

3. Soldier's home address is: 3 CHURCH CIR # 243 ANNAPOLIS MARYLAND 21401-1933

FOR THE COMMANDER:

HAINES, ELIZABETH A., PA II
SERCO, JOINT READINESS CENTER

1 Encl
Cy DD Form 214
Cy orders (if required)
CF:
Indiv conc
C, Admin Div

SEP 14 2010
H4442-5-7

APP: O2

DEPARTMENT OF THE ARMY
450th CIVIL AFFAIRS BATTALION (AIRBORNE)
6601 BALTIMORE AVENUE
RIVERDALE, MD 20737

REPLY TO
ATTENTION OF:

March 5, 2009

Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

RE: Commander's Letter Pursuant to the Servicemember's Civil Relief Act,
50 U.S.C. App. § 522(b)(2)(A)

CPT Geoffrey L. Tibbetts is a U.S. Army Reservist assigned to the 450th Civil Affairs Battalion (Airborne). On January 5, 2009, he was mobilized for active-duty military service in Iraq. His military duties require attendance to all assigned training, tasks, operations, and combat missions in support of Operation Iraqi Freedom. Military leave is not authorized to appear in court at this time.

CPT Tibbetts will complete his active duty service on or about March 31, 2010.

Sincerely,

Shaun M. Edwards
MAJ, CA, USAR
Company Commander

APP. 03